Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

MANUEL GALVAO,

Petitioner,

vs.

THE GILLETTE COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the decision of the Federal District Court upheld on appeal by the Circuit Court which decision based on Local Rule 83.5.2(c) refused to permit Petitioner's counsel to withdraw and allow Petitioner to Proceed Pro Se denied Petitioner the right to represent himself as permitted by 28 U.S.C. § 1654 and denied him his right to choice of counsel.

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The opinion of the Court of Appeals, unpublished, (App. 2-11) and of the District Court (App. 12-43) are included in the Appendix.

JURISDICTION

The Court of Appeals entered its judgment on August 12, 1997 (App. 1). The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION AND COURT RULE INVOLVED

28 U.S.C. § 1654 provides: "in all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."

Local Rule 83.5.2 of the Massachusetts Federal District Court provides:

(c) **Withdrawal of Appearance.** An attorney may withdraw from a case by serving notice of his withdrawal on his client and all other parties and filing the notice, provided that (1) such notice is preceded or accompanied by notice of the appearance of other counsel: (2) there are no motions pending before the court: (3) no trial date has been set: and (4) no hearings or conferences are scheduled, and no reports, oral or written, are due. Unless these conditions are met, an attorney (including one

whose services have been terminated by his client) may withdraw from a case only by leave of court.

STATEMENT

A. Summary of Proceedings Below

Manuel Galvao, the petitioner-appellant, a black Cape Verdean national, brought this action before the Massachusetts Commission Against Discrimination ("MCAD") on July 16, 1992, alleging that the respondent-defendant, Gillette Company, his employer of twenty years, had discriminated against him in terms and conditions of his employment by repeatedly denying his request for a reclassification of his employment "grade" because of his race and nationality. At that time, Mr. Galvão remained the lowest graded employee in the Advanced Processing Group of the Boston Research and Development Division of Gillette, and the only Cape Verdean national.

After Galvao filed his complaint, Gillette commenced a pattern of retaliation which culminated in his reassignment to a supervisor, Dr. Hong Mai Trankiem, in January, 1993, whose unrelenting, unjustified criticism of every aspect of his job performance caused him intense emotional distress and exhaustion, the exacerbation of physical injury unrelated to his work, and led to his eventual discharge. In November 1993, after earlier amendments alleging retaliation were filed with MCAD, Mr. Galvao added a claim of retaliation based upon his November 8, 1993 termination to his MCAD complaint.

After his discharge, Galvao withdrew his complaint from the MCAD on March 3, 1995 and filed this action in the Norfolk County Superior Court of Massachusetts on April 6, 1995. The defendant removed the proceedings to the Federal District Court on April 25, 1995.

In November 1995, Patricia L. Davidson, Galvao's lawyer, filed a Motion to Withdraw Appearance and an Affidavit (App. 44-47). Davidson informed the court that Galvao had sent Davidson a letter discharging her as legal counsel and had retrieved his file. The motion was denied. (App. 48). His Counsel filed a Motion for Reconsideration and a Hearing with an accompanying affidavit in December 1996. (App. 49-51).

On January 12, 1996 a hearing was held on the Motion for Reconsideration. The District Court Judge stated he had received a letter from Galvao. (App. 53) but again denied the motion (App. 60).

On April 11, 1996 the District Court held a hearing on the timing of Galvao's response to Gillette's Motion for Summary Judgment and indicated he would "revisit" the issue of withdrawal of counsel after summary judgment was decided. (App. 63). On July 31, 1996 the court granted Gillette's Motion for Summary Judgment. (App. 44). Galvao obtained new counsel and noticed his appeal on August 29, 1996.

On August 12, 1997 the Court of Appeals upheld the District Court's granting of Gillette's Motion for Summary Judgment and the denial of Galvao's counsel's attempts to withdrawal. A timely Petition for Certiorari was filed with this court.

B. Facts Regarding Attempted Withdrawal of Counsel

Galvao found himself in the Federal District Court in April 1995 as the result of Gillette's Removal Petition. On November 13, 1995 Galvao's lawyer, Patricia L. Davidson, filed a Motion to Withdrawal stating that there was disagreements on the future course of the litigation, that she had received a letter of discharge from Galvao, and that Galvao had retrieved his entire case file. (App. 46-47). Davidson further indicated in her motion that no motions were pending and trial had not yet been scheduled. (App. 46).

The District Court summarily denied the motion. (App. 48).

In December 1995 Davidson filed a Motion for Reconsideration and Request for a Hearing (App. 49) stating that Galvao was in the process of getting new counsel, was not cooperating with Davidson, and wanted to address the court. Davidson relates the following conclusion:

> "deterioration of the communication between the Plaintiff and our office and the Plaintiff's articulated lack of respect for both the Federal Rules of Procedure and our professional opinion have made it impossible for us to fulfill our obligations to him, this Honorable Court and the opposing Party." (App. 56).

On January 12, a hearing was held on the Motion to Withdraw. The court indicated that it had received a letter from Galvao which discusses his disagreements with counsel, the court had reviewed it and was sealing it. (App. 56). Galvao attempted to explain his problems to

the judge, but backed off when the court admonished him that this would not be wise in the presence of opposing counsel. (App. 56).

Galvao's letter firing Davidson as his attorney is not part of the appellate record nor is his letter to the judge. However, certain things are clear, that he has fired his attorney and that he has lost all confidence in Davidson.

The Court evaluates the situation as one of economics:

> "there is no question that there is a disparity from time to time between parties. . . . But it's not a grounds to demand everything from counsel and, then, if counsel is unable to provide that level of service, because of limitations on the resources, to make counsel the responsible party for various kinds of very practical decisions that arise during the course of litigation." (App. 56).

The court stated it was not going to allow counsel to withdraw until Local Rule 83.5.2 was complied with. Local Rule 83.5.2 provides:

> **(c) Withdrawal of Appearance.** An attorney may withdraw from a case by serving notice of his withdrawal on his client and all other parties and filing the notice, provided that (1) such notice is preceded or accompanied by notice of the appearance of other counsel: (2) there are no motions pending before the court: (3) no trial date has been set: and (4) no hearings or conferences are scheduled, and no reports, oral or written, are due. Unless these conditions

> are met, an attorney (including one whose services have been terminated by his client) may withdraw from a case only by leave of court.

Although not part of the record Galvao states that he indicated to the judge in his letter that part of the problem in getting a new lawyer was his present lawyer had not withdrawn.

The court lectures Galvao on the importance of a prompt resolution of the case, abiding by the rules, and attending discovery. Galvao accepts the judge's ruling. (App. 56-57).

The court enters an order on January 12, 1996 denying the Motion to Withdrawal, stating as the reason "no successor counsel having been identified". (App. 60).

On April 11, 1996 Court holds a conference on the timing of Gillette's Motion for Summary Judgment and the Response. The motion is due on April 27, 1996. (App. 62). The judge indicates that he has held an ex parte conference with Plaintiff's attorneys relating to how to proceed given differences of opinion between Galvao and his lawyer. (App. 63). The judge states he will "revisit" the issue of counsel after he has ruled on Summary Judgment (App. 66).

The judge states he has told counsel that if there is a disagreement about certain arguments to be presented it should be presented the way Galvao wants them presented and counsel wants them presented. (App. 65).

On July 30, 1996 the District Court entered a Memorandum and Order (App. 12) and on July 31, 1996 a

Judgment granting summary judgment to Gillette. (App. 44).

Galvao hired new counsel to handle the appeal: Mark F. Itzkowitz. Itzkowitz attempted to supplement the record appendix with documents which Galvao wanted included, but Galvao's trial attorney had not. On January 17, 1997 the Circuit Court denied Itzkowitz's Motion to Supplement. (App. 68).

Itzkowitz then attempted to file a brief which referenced matters which Galvao wanted included in the record. These included a number of internal Gillette documents Galvao considered important. The brief was ordered stricken. (App. 69).

Although the District Court Judge had admonished Davidson in the pre-trial conference of April 11, 1996 that Galvao's arguments with which Davidson disagreed should be designated as such and presented alternatively in the response to Gillette's Motion for Summary Judgment, it is clear from the desperate and futile attempts of his appellate counsel to amend the record in the appellate court that this was not done to Galvao's satisfaction.

The Circuit Court in its opinion of August 12, 1997 determined that the District Court's conclusion that Galvao was abetter off with present counsel "even if they were not seeing eye to eye was not an unreasonable one" (App. 9). The Circuit Court declined to "second guess his counsel's strategic decisions." (App. 10).

The District Court had in effect denied Galvao the right to proceed pro se and coerced him into proceeding with counsel he did not want. Furthermore counsel did

not advance arguments Galvao though important. His appellate counsel was prohibited by the Circuit Court from making these arguments.

REASONS FOR GRANTING THE WRIT

A. The Petitioner was Entitled to Counsel of His Own Choosing or to Proceed Pro Se

This Lawsuit was removed to the Federal Court in the end of April 1995. Galvao's counsel, Davidson, in early November 1995 filed an Affidavit in Support of Motion to Withdraw reciting that Galvao had discharged her as counsel, had retrieved his file, and that communication between counsel and client had deteriorated as the result of a disagreement. (App. 46).

The District Court summarily rejected the motion on the grounds that no substitute counsel had entered their appearance as required for automatic approval under Local Rule 83.5.2(c). Galvao sent the judge a letter, which was not made part of the record on appeal which presumably detailed the disagreements and Galvao's desire for other representation.

On January 12, 1996 District Court Judge besides denying him the right to fire his lawyer also deals with Galvao's refusal to appear at a deposition presumably because he does not want to be represented by Davidson. The court discusses its obligation under Civil Justice Reform Act to secure the parties a prompt resolution of a lawsuit. The court reminds Galvao of his obligation to

attend a deposition and the consequences of not doing so. (App. 56).

The quality of the relationship between lawyer Davidson and Galvao may be gleaned from the following comments to the judge by Davison:

> ". . . . I believe you have addressed my chief concerns, that the plaintiff understands the importance of complying with the discovery rules and that discovery depositions, interrogatories. . . . " (App. 55).

On April 11, 1996 the judge states that he will "revisit" the question of withdrawal after he has dealt with the Motion for Summary Judgment. He also indicates that will he be more willing to permit withdrawal of counsel after the summary judgment process. (App. 66). Logic would dictate the opposite. The closer the case comes to trial and the more deeply his "fired lawyers" get involved in the case the more difficult it will be for them to withdraw without prejudicing Galvao and the more difficult it will be to secure substitute counsel. Cases which Petitioner will shortly discuss indicate the closer trial nears the more reason there is not to let lawyers withdraw.

The District Court Judge will never have an opportunity to "revisit" the issue of withdrawal of counsel. Galvao's case will never go to trial. He is bound and strapped to counsel he has fired, in which he has no confidence, and who are handling the case contrary to his wishes. His rights have been circumscribed by a court rule really intended to prevent lawyers from withdrawing on the eve of trial or when other major matters are

pending. Unsaid is the real reason: the horror for the trial judge of a pro se Plaintiff in a relatively complex case faced with the resources of the Gillette Company and a major law firm.

Galvao's appellate lawyer, Itzkowitz, tried to add documents Galvao wanted included in his Opposition to Summary Judgment as a Supplemental Record Appendix. The Motion was denied. (App. 68). He tried to argue from them in his first brief and the brief was stricken by the Circuit Court. (App. 69).

Itzkowitz's efforts to supplement the record on appeal bear witness to the fact the District Court's "shotgun marriage" of Galvao to lawyer Davidson was not entirely successful.

The Circuit Court determined that the District Court had not abused its discretion in refusing to allow counsel to withdraw. The Circuit Court found that the lower court's conclusion that Title VII litigation is complex, and that Galvao was better off with counsel he had fired than with none was "not unreasonable." (App. 9). The Circuit Court was also impressed with the lower court's intention to "consider the issue later". (App. 9).

In support of its decision the Circuit cites *Andrews v. Bechtel Power Corp.*, 780 F.2d 124 (1st Cir. 1985), *cert. denied*, 444 U.S. 1084. *Andrews* is the poll opposite of this case. Andrews had been allowed to fire numerous counsel. He had asked the court to appoint him counsel and the court actually got involved helping Andrews in finding a lawyer. The trial had been postponed many times because Andrews did not have counsel. The egregious facts in that case in no way compare to this where Galvao

five months after the case is filed with no motions pending, and no trial date set, seeks to discard his lawyer.

28 U.S.C. § 1654 provides:

> "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."

In *Chapman v. U.S.*, 553 F.2d 886, 891 (5th Cir. 1977) the fundamental place of Section 1654 in the scheme of American justice was noted:

> "The precursor of § 1654 was enacted by the First Congress as section 35 of the Judiciary Act of 1789, 1 Stat. 73.92. It was passed in the context of colonial tribunals composed largely of laymen. Section 35 was enacted by the Congress and signed by President Washington one day before the sixth amendment was proposed."

The right of a person to act pro se in a criminal case arises out of the Sixth Amendment of the Constitution and is not a mere product of legislation. *Adams v. U.S. ex. rel., McCann*, 317 U.S. 269, 279 (1942). *Carter v. Illinois*, 329 U.S. 173, 174-175 (1947). *Faretta v. California*, 422 U.S. 806 (1975).

In *U.S. v. Dougherty*, 473 F.2d 1113, 154 U.S. App. D.C. 76 (1972) the court stated:

> "Defendant has a moral right to stand alone in his hour of trial and denial of that right is not to be redeemed through the prior estimate of someone else that the practical position of the defendant will be enhanced through representation by another or the subsequent conclusion

that that defendant's position has not been disadvantaged."

Although *Dougherty, supra* was a criminal case the sentiments expressed by the Appeals Court should have guided the District Court's review of the Motion to Withdraw. Instead of considering Galvao's rights under 28 U.S.C. § 1654, the court focused on the court rule requiring substitute counsel. Galvao's statutory rights were never mentioned either by the District Court or the Circuit Court.

The right to self representation is a fundamental right in criminal cases whether based on the Sixth Amendment or on statute. *U.S. v. Treff*, 924 F.2d 975 (10th Cir. 1991), *cert. denied*, 111 S. Ct. 2272, 114 L. Ed. 2d 723. The right to self representation in civil cases although not fundamental is firmly rooted in a statute embodying rights predating the Constitution. It should not be circumscribed by a housekeeping court rule.

The Circuit Court suggests that the standard of review of the District Court's decision denying counsel's Motion to Withdraw is one of "abuse of discretion". The right to self representation in criminal cases is absolute. *Adams v. U.S., supra*. The right in a civil case is of such a low quality that it is measured by a standard of abuse of discretion.

28 U.S.C. § 1654 is a lineal descendent of the First Judicary Act. This Court in *Faretta, supra* at 830 n.39, recited Tom Paione's statement made in defense of the 1776 Pennsylvania Constitution:

"The right to plead one's own cause is a 'natural right.' "

The right to represent one's self does not confer on the Petitioner any right to "hybrid representation." *U.S. v. Wolfish*, 525 F.2d 457 (2nd Cir. 1975), *cert. denied*, 423 U.S. 1059. "Hybrid" is referring to representation by both client and counsel. Galvao was not seeking hybrid representation. He had fired his lawyer, and wanted her to withdraw. The judge would not allow her to withdraw. Instead he forced Galvao into an unhappy marriage containing elements of the "hybrid representation" condemned in *Wolfish, supra*.

The District Court promised to "revisit" the issue of the withdrawal of counsel with a more flexible attitude after it had decided the Motion for Summary Judgment. The reason for this is unclear since now an extensive discovery process had been completed and the time for trial was approaching. If avoiding court delays was behind the court's reasoning then the sooner counsel got out of the case the better.

The U.S. Supreme Court has not addressed the quality of the right of counsel in civil cases in the exhaustive manner it has in criminal ones. The First Circuit appears to believe that the standard to be used in determining whether the lower court erred in refusing to allow Galvao to fire his counsel and proceed pro se at least for a period of time is whether the lower court "abused its discretion".

Petitioner offers a decision of Judge Friendly in *O'Reilly v. New York Times Co.*, 692 F.2d 863 (2nd Cir. 1982) as the proper measurement of the right to discharge counsel and proceed pro se in civil cases.

In *O'Reilly, supra,* Rev. John O'Neill, a Plaintiff in a liable action against the New York Times, had discharged his brother William as his attorney 13 days after the Times had filed a Motion for Summary Judgment. He intended to proceed pro se.

The District Court Judge denied the motion to proceed pro se because it would be "disruptive" of the trial in that there would be two opening statements, two cross examinations, and there would be a summation by Father O'Reilly in a Roman Collar before a jury. *O'Reilly, supra,* 692 F.2d 863, 865 (1992).

The Circuit Court found Father O'Reilly's Appeal of the District Court Order denying him the right of self representation to be an "appealable order" and was not barred under the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541 (1949).

The Circuit Court quoted at length from this court's decision in *Faretta, supra* and deemed O'Reilly's right of self representation in a civil case "a right of high standing not simply a practice to be honored or dishonored by a court depending on its assessment of the desiderata of a particular case . . . " *O'Reilly, supra,* 692 F.2d 863, 867.

Quoting from *Faretta, supra,* 830 n. 39, self representation was characterized "as a basic right of a free people."

The court one by one reviewed the lower courts arguments, possible disruption, identity of interests between the two Plaintiffs, O'Reilly's wearing a clerical collar and others, and discarded them.

The Circuit Court characterized the right to self representation as "unqualified" if invoked prior to trial but

sharply curtailed if asserted after the trial has begun. However, a party asserting his statutory right of self representation must clearly and unequivocally discharge any lawyer retained. *O'Reilly, supra,* 869.

The lower court's fear of "disruption" was characterized "as the price the framers of the sixth amendment and the First Judicary Act thought well worth paying." *O'Reilly, supra,* 869 n.7.

It might be argued that Galvao's attitude was equivocal about whether he actually wanted his lawyer discharged or merely brought around to Galvao's position. This argument of course flies in the face of Davidson's affidavit that she was fired and Galvao took back the file. (App. 45).

Faretta, supra like this case presented equivocal facts on whether Faretta wanted to represent himself or wanted a new lawyer. Like Galvao, Faretta did not want his present lawyer, the public defender, which he viewed as too busy to handle his case, but did ask for the appointment of a private attorney. If faced with the choice of the Public Defender or self representation, he wished self representation. The judge in *Faretta* as in this case had paraded before the defendant all the horrors of self representation, before refusing him the right to do so.

This court did not view Faretta's request for non-public defenders to defend him as any lessening of his right to fire his public defender and stand unrepresented.

This court quoted Mr. Justice Jackson:

> "We confront here a nearly universal conviction, on the part of our people as well as our

> courts, that forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so." *Faretta, supra,* 817.

At the hearing of January 12, 1996 the court fails to note that a trial date has not even been set and the only motion before the court is that of counsel to withdraw.

On April 11, 1996 the judge meets with Galvao's lawyers ex parte (App. 62). This conference has not been made part of the appellate record. However the court reviews with Galvao a portion of the conference where he has told the lawyers to present arguments in response to Gillette's Motion for Summary Judgment in an alternative fashion if there is a dispute between Galvao and his attorneys. (App. 62) He also informs Galvao he will consider his right to counsel after he has ruled on summary judgment. (App. 66)

The Federal Court has denied Galvao the right to fire his lawyer, coerced him to stay with the lawyer he fired, denied Galvao the right of self representation which would at least temporarily be the consequence of firing his lawyer all in violation of 28 U.S.C. § 1654 and *Faretta, supra.*

The District Court's rulings occurred when no motions were pending and no trial had been set. There were no counterbalancing reasons why Galvao should not have been permitted to fire his lawyer.

The Circuit Court's decision that the District Court was looking out for Galvao's interests and did not abuse its discretion in coercing Galvao to stay with his lawyers

was the wrong standard. The proper standard was there any compelling reason for not letting Galvao fire his lawyers. *Faretta, supra.*

B. The Interpretation of a Court Rule Controlling the Conduct of Lawyers Denies Litigants the Right to Self Representation and Counsel of Their Choice

The effect of Rule 83.5.2(c) is to prevent litigants from discharging their present lawyer until they have engaged another lawyer. A rule to control lawyers is impinging on the substantial rights of litigants to free choice of counsel and self representation.

The U.S. Supreme Court has recognized although local federal courts have the right to pass local rules the local rules must be consistent with Acts of Congress. *Frazier v. Heebe*, 482 U.S. 641, 646 (1987), *In Re Ruffalo*, 390 U.S. 544 (1968). This court's power over local court rule making is not only inherent in its supervisory function, it is embodied in statute. *See* 28 U.S.C. § 2071.

This Court in *Frazier, supra* struck down a local rule of the Federal Court for the Eastern District of Louisiana which prohibited attorneys admitted to the Bar in Louisiana, but not residing in Louisiana, from appearing in the Eastern District. The Louisiana local rule was characterized as "irrational" by this court and stricken.

Local Rule 83.5.2(c) is a rational on its face as an attempt to prevent lawyers from abandoning clients and cases leaving the client unrepresented and the court calendar clogged with unrepresented parties, unresponded to motions, and untried cases.

Petitioner suggests the purpose of the rule is only to control the activities of attorneys, not those of parties.

The Federal Judge in this case has been advised by a uncontradicted affidavit (App. 46-47) that lawyer Davidson has been fired and the client has retrieved his file. This is clear evidence that Galvao no longer wants Davidson's representation. Galvao presumably has told the judge in a letter he has fired Davidson.

The judge does not believe firing Davidson is in Galvao's best interests. Equally important the judge perceives that, not now, but soon Gillette's rights to a speedy trial will be impinged. (App. 54). Based on these two considerations the judge denys Galvao the right to fire his lawyer.

The interpretation of the local rules which forces a litigant to unfire his attorney in this early stage of the proceedings, then compels him to proceed to extensive discovery with a lawyer not of his choosing, be offered the opportunity to present alternative arguments is irrational and a perversion of the purpose of the rule. It is a violation of 28 U.S.C. § 1654.

CONCLUSION

The Petitioner respectively request this court grant his request for a Writ of Certiorari.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NO. 96-2062

MANUEL GALVAO,
Plaintiff, Appellant,

v.

THE GILLETTE COMPANY,
Defendant, Appellee.

JUDGMENT

Entered: August 12, 1997

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By The Court
Vincent F. Flanagan
Acting Clerk

By /s/ JANICE M. O'NEILL
Chief Deputy Clerk

[NOT FOR PUBLICATION]

United States Court of Appeals
For the First Circuit

No. 96-2062

MANUEL GALVAO,

Plaintiff, Appellant,

v.

THE GILLETTE COMPANY,

Defendant, Appellee.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS

[Hon. Douglas P. Woodlock, *U.S. District Judge*]

Before

Selya, *Circuit Judge*,
Coffin and Bownes, *Senior Circuit Judges*.

Mark F. Itzkowitz for appellant.

Richard P. Ward with whom *Bonnie B. Edwards* was on brief for appellee.

August 12, 1997

COFFIN, *Senior Circuit Judge*. Appellant Manuel Galvao, a black Cape Verdean male, contends that the district court erred in dismissing his federal and state discrimination and retaliation claims against his former employer, the Gillette Company ("Gillette").[1] He also maintains that the district court erred in denying his former counsel's motion to withdraw. We affirm.

FACTS

We recite the facts in the light most favorable to the party opposing summary judgment. *See Fennell v. First Steps Designs, Ltd.*, 83 F.3d 526, 534 (1st Cir. 1996). The incidents underlying this case began in approximately 1989, when Galvao was working in the Boston Research and Development Division (BRAD) of Gillette as a Grade 7 technician. He sought a promotion or upgrade of his job classification, which was denied.[2] Instead, Gillette supervisors presented Galvao with a Career Development plan designed to qualify him for promotion to a Grade 8 position. On Galvao's protest, an audit of his position

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[1] Galvao specifically claims that it was Gillette as a corporate entity, and not any specific individuals there, who discriminated against him.

[2] There seems to be some confusion as to whether the change sought was a promotion or a regrading of Galvao's existing job. Indeed, Galvao himself testified in his deposition that he was unclear as to the distinction between the two. The issue is irrelevant to our analysis, however, since Galvao is unable to show that there were others similarly situated for either circumstance.

was performed by the Gillette Human Resources Compensation Department, which concluded that his position was properly graded. Galvao sought and received a review of the audit by Gillette's Open Door Review Panel, which also upheld the denial of the upgrade.[3]

In July 1992, Galvao filed a complaint with the Massachusetts Commission Against Discrimination ("MCAD"), alleging that he had been denied a promotion and given a negative performance evaluation due to his race, color and national origin. He maintains that after his filing, his supervisors distanced themselves from him, and subjected him to greater criticism and demands. He was assigned to a new supervisor, Dr. Hoang Mai Trankiem, in February 1993.[4] Although Trankiem and Galvao initially had a positive relationship as a result of an in-house project they had previously worked on together, relations between them rapidly deteriorated. Trankiem instituted a system of daily worksheets and productivity reports on Galvao, and, according to him, exerted tremendous pressure on him, with the result that he felt increasingly stressed. Despite repeated requests by Galvao to both Trankiem and her supervisor, Dr. Stan

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[3] The Panel was composed of Doris Ferrer Roach, an attorney in Gillette's General Counsel's Office and a Hispanic female; Timothy W. Horan, Director of Human Resources-Manufacturing, a white male; and Robert A. Williams, III, Vice President, Corporate Director, Urban Affairs, a black male.

[4] Dr. Trankiem is a Vietnamese female. Trankiem testified in her deposition that she requested she supervise Galvao in an effort to improve his productivity, which had become a source of concern under a previous supervisor.

Wreford, for intervention vis a vis his working responsibilities and Trankiem's supervision of him, no help was forthcoming.[5] Rather, Galvao was eventually provided with a Final Written Warning,[6] and then terminated on November 8, 1993. He subsequently filed suit, bringing both federal and state discrimination and retaliation claims. The district court granted summary judgment for Gillette, and this appeal followed.

DISCUSSION

We review the district court's grant of summary judgment *de novo*. *See Mesnick v. General Electric Co.*, 950 F.2d 816, 822 (1st Cir. 1992). In so doing, we have thoroughly reviewed the record and the briefs, and find ourselves in accord with the district court's conclusions. Mindful that where a district court has produced a comprehensive, well-reasoned opinion, we should not needlessly expound at length, we discuss each of Galvao's claims briefly. *See Lawton v. State Mut. Life Assur. Co. of America*, 101 F.3d 218, 220 (1st Cir. 1996).

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[5] In one memo to Dr. Wreford, Galvao described Dr. Trankiem's management style as "Vietnamese" and said he was being subjected to psychological torture and treated like a prisoner or a slave.

[6] As part of his Final Written Warning, Galvao was upgraded to Grade 8 by Dr. Trankiem in an effort to remove a perceived barrier to his productivity.

1. Title VII Discrimination.

Under the well-established *McDonnell Douglas* framework for Title VII cases, *see McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *see also Smith v. F.W. Morse & Co., Inc.*, 76 F.3d 413, 420 (1st Cir. 1996), a plaintiff seeking to prove discrimination without direct evidence of bias must first establish a prima facie case of discrimination. *See Lattimore v. Polaroid Corp.*, 99 F.3d 456 (1st Cir. 1996).[7] This is accomplished by showing that the employee is a member of a protected class and that similarly situated employees who were not members of the class were treated more favorably. *See id.* If such a showing is made, the burden then shifts to the employer to articulate a legitimate non-discriminatory reason for its actions. *See id.* Once this is accomplished, the employee may then attempt to prove that the proffered reason is a pretext. *See id.*[8]

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[7] Cases decided under the ADEA (Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634) are applicable in the Title VII context, *see Fennell*, 83 F.3d at 535 n. 9, and we therefore cite to cases of both types for purposes of the *McDonnell-Douglas* analysis.

[8] The district court concluded this was a "non-competitive promotion" case (rather than what it termed a "garden variety" failure to promote case), and therefore adopted a modification promulgated in a district court case in Tennessee, *Young v. State Farm Mut. Auto. Ins. Co.*, 868 F.Supp. 937, 944-45 (W.D. Tenn. 1994). As both the "garden variety" and "non-competitive promotion" analyses require a plaintiff to address the key issue here – i.e. whether the plaintiff is treated differently from others similarly situated – we do not for the present distinguish between non-competitive promotion and other failure to promote cases.

The district court found that Galvao had failed to show that there were similarly situated employees who could be used as a basis of comparison. We see no flaw in its reasoning. The employees identified by Galvao either were not in the same grade as him, or they worked in different areas.

We recently cautioned that courts must exercise particular care when evaluating a plaintiff's claim that an employer applied its standards differentially (*i.e.*, distinguished between the plaintiff and those similarly situated). *See E.E.O.C. v. Amego, Inc.*, 110 F.3d 135, 145 (1st Cir. 1997) (citing *Banerjee v. Board of Trustees*, 648 F.2d 61, 63 (1st Cir. 1981)) (in academic tenure context, plaintiffs who were denied tenure must show that their qualifications are at least comparable to those of "a middle group of tenure candidates as to whom both a decision granting tenure and a decision denying tenure could be justified as a reasonable exercise of discretion by the tenure-decision making body"). A plaintiff must be able, at a minimum, to demonstrate that there are at least some basically comparable employees. Galvao was unable to do this.

Although the district court's finding that Galvao had failed to make out a prima facie case made it unnecessary to continue the *McDonnell Douglas* analysis, the district court went on to find that Gillette's proffered reason for not upgrading Galvao – that he lacked the credentials and characteristics of a Grade 8 technician – was not a pretext. The district court thoroughly addressed the evidence on this issue, and we need not repeat it. We agree that, on this record, a jury could not conclude that Gillette's reasons were pretextual, and Galvao's Title VII discrimination claim therefore fails.

2. Title VII Retaliation.

Galvao also contends that the district court erred in dismissing his separate claim that Gillette retaliated against him for filing the MCAD complaint. He asserts that his supervisor subjected him to undue supervision and assessment, and ultimately terminated him in response to his administrative claim.

The *McDonnell Douglas* burden shifting analysis is also used in retaliation claims where there is no direct evidence of a defendant's retaliatory animus. *See Fennell*, 83 F.3d at 535. A plaintiff seeking to show a prima facie case of retaliation under Title VII must show 1) he or she engaged in protected conduct under Title VII and that the alleged retaliator was aware of it, 2) an adverse employment action, and 3) a causal connection between the first two elements. *See id.; see also Petitti v. New England Tel. & Tel. Co.*, 909 F.2d 28, 33 (1st Cir. 1990). Once this showing has been made, the burden shifts to the defendant to articulate a legitimate non-discriminatory reason for its employment decision. *See Fennell*, 853 F.3d at 535.

Even given a generous reading, Galvao's retaliation claim falters. While he can establish that he engaged in protected conduct – the filing of the MCAD complaint – he has failed to show that Gillette personnel knew about this at the time of the allegedly adverse employment actions, or that there was a causal relationship between his filing his MCAD complaint and the challenged conduct. As the district court explained, the record shows that the adverse employment actions of which he complains, including his termination, were the result of his own poor performance and insubordination.

3. Motion of Counsel to Withdraw.

Galvao also contends that the district court erred in denying his previous counsel's motion to withdraw. He argues that the court's ruling compelled him to continue with counsel in whom he had lost faith, and whose commitment to his case he doubted, and that his case was thereby prejudiced. Under Local Rule 83.5.2(c), because successor counsel had not been obtained by Galvao, it was within the court's discretion whether to grant his counsel's motion to withdraw.[9] In the circumstances, we cannot say that the court's refusal to do so was an abuse of discretion. *See Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 135 (1st Cir. 1985). Title VII litigation is complex and a pro se litigant embarks on this path with some significant disadvantage. The court's conclusion that Galvao was better off with counsel, even if they were not exactly seeing eye to eye, was not an unreasonable one. Moreover, the court indicated that it would be willing to reconsider the issue later. Furthermore, although we realize that a serious difference existed between Galvao and his counsel, it appears from the record that the district

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[9] Rule 83.5.2(c) states:

> An attorney may withdraw from a case by serving notice of his withdrawal on his client and all other parties and filing the notice, provided that (1) such notice is preceded or accompanied by notice of the appearance of other counsel; (2) there are no motions pending before the court; (3) no trial date has been set; and (4) no hearings or conferences are scheduled, and no reports, oral or written, are due. Unless these conditions are met, an attorney (including one whose services have been terminated by his client) may withdraw from a case only by leave of court.

court made every effort to permit Galvao to present his case as he wished.[10]

Additionally, Galvao's counsel was bound by an ethical obligation to prosecute his case fully and effectively. *See Hammond v. T.J. Little*, 809 F.Supp. 156, 159 (D.Mass. 1992). Galvao maintains that his counsel failed to do so because she did not present various documents obtained during the course of discovery to the court which he alleges would have bolstered his case. We decline Galvao's invitation to second guess his counsel's strategic decisions about the evidence to present in support of a claim.

4. State law claims.

Finally, Galvao appeals the dismissal of his state law discrimination and retaliation claims by the district court, arguing that under the more relaxed standard used in Massachusetts ("pretext only"), a jury could have found, on the basis of the evidence that he presented, that Gillette's reasons for failing to upgrade him and terminating him were pretextual. In support of this contention, Galvao cites *Blare v. Husky Injection Molding Systems Boston, Inc.*, 419 Mass. 437 (1995). We read *Blare* as holding that Massachusetts, while adhering to the three stage *McDonnell Douglas* analysis, requires that a plaintiff show only

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[10] In a pretrial hearing, the district court specifically informed Galvao that he had instructed his counsel that in any situation where a difference arose between Galvao and counsel as to the presentation of arguments, Galvao's counsel should present it both in the form that Galvao wished and in the form that counsel's legal judgment suggested.

that it was more likely than not that the articulated reason for the employer's action was pretextual, rather than providing more direct proof of discriminatory motive by the employer, as the federal standard requires. *See id.* at 444-45; *see also Lattimore*, 99 F.3d at 465. As discussed, *infra* (and putting to one side his failure to show that there were similarly situated employees), Galvao failed to adduce any significant evidence to support his claim that Gillette's articulated reasons for its actions were pretextual. Accordingly, his state claim founders on this lack of evidence of pretext, just as his federal one did.

Affirmed.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MANUEL GALVAO, Plaintiff,	)	CIVIL ACTION NO. 95-10843-DPW
v.	)	
THE GILLETTE COMPANY, Defendant.	)	

MEMORANDUM AND ORDER
July 30, 1996

Manuel Galvao, a black male of Cape Verdean national origin and a former employee of defendant the Gillette Company ("Gillette"), brings this action alleging that Gillette, by failing to promote him, discriminated against him because of his race and national origin thereby violating Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* (1994) (Counts I and II). He also alleges that Gillette engaged in retaliation in violation of 42 U.S.C. § 2000e-3(a) (Count III). Galvao also claims three parallel violations of Mass. Gen. L. ch. 151B, § 4 (1996) (Counts IV, V and VI). Gillette has moved for summary judgment. After hearing, I have determined to grant the motion.

I.

Manuel Galvao was employed by Gillette from June 1973 to November 8, 1993. In July of 1987, Galvao was a Grade 6 Technician in Gillette's Advanced Processing

Group of the Boston Research and Development Division ("BRAD"). In August 1987, Patricia Foley, a Compensation Analyst and employee of Gillette, conducted a job audit of Galvao's functions and reclassified his position as a Grade 7. Galvao was the only Grade 7 Technician in his division; all other technicians were classified as Grade 8. Further, Galvao was the sole black technician in his division and the only one of Cape Verdean origin.[1] All other technicians were Caucasian-Americans.

By 1989, Galvao was convinced that he qualified for an upgrade to Grade 8 and accordingly, requested that Gillette reclassify him. This request was denied. Galvao reiterated his request for an upgrade on several occasions but was rebuffed each time. In June of 1990, Gillette have Galvao a personalized "Career Development Plan" to assist him in qualifying for a Grade 8 position. In 1991, after another request by Galvao for an upgrade, Foley was directed to conduct a new audit of Galvao's position. With her during the audit was Steven Brack, a new Compensation Analyst. Foley performed the audit by observing Galvao work, questioning him, and subsequently comparing her findings with Grade 8 Senior Technician job descriptions. On November 4, 1991, Foley notified Galvao that his proper classification was Grade 7.

Shortly thereafter, Galvao requested that the Gillette Open Review Panel (the "Panel") investigate his allegation that he was unfairly denied a promotion to Grade 8. The Panel was comprised of: Doris Ferrer Roach, an

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[1] Working side by side with Galvao, however, at least during his final summer with Gillette, was a female, Cape Verdean student technician. *See Infra*, Section III.B.3.c.

Hispanic attorney in Gillette's General Counsel's Office; Timothy W. Horan, Director of Human Resources-Manufacturing, G.N.A., a Caucasian; and Robert A. Williams, III, Vice President, Corporate Director, Urban Affairs, G.N.A., an African-American. The Panel interviewed Galvao, his supervisor and other employees, and reviewed Foley's audits and memoranda written both by and to Galvao. On March 31, 1992, the Panel decided that Galvao was properly classified as a Grade 7 and after issuing a Memorandum, informed him of its decision on April 21, 1992.

In July of 1992, Gillette again refused Galvao's request for an upgrade to Grade 8 and on July 16, 1992, he filed a complaint with the Massachusetts Commission Against Discrimination ("MCAD") alleging violations of Mass. Gen. L. ch. 151B, § 4 based on race, color and national origin discrimination. Galvao alleges that subsequent to the filing of the complaint with MCAD, he was subjected to a pattern of retaliation including but not limited to "needless and intrusive monitoring of work, unjustifiable criticism of work, unwarranted personal criticisms, excessive assignments, diminished scores on performance evaluations, denial of overtime pay, insufficient training, poor communication about work-related issues and indifference to [his] attempts to rectify the deterioration of his employment relationship with Gillette." (Complaint at ¶ 22.)

Early in 1993, Dr. Mai Trankiem, a Chief Scientist in the BRAD division, offered to take over supervision of Galvao, believing that she could "turn around" what Gillette contends was his inadequate performance. Trankiem believed that she could help Galvao save his job

and qualify for the upgrade to Grade 8. Three months later, Trankiem issued Galvao a final written warning which she discussed with him on April 29, 1993. During this discussion Trankiem told Galvao that he had sixty days to "improve his performance and cease being rude and uncivil" to her. (Def. Undisp. Mat. Facts, ¶ 20.) This warning period was extended through August 31, 1993 because Galvao, due to a non-work related accident, worked reduced hours during May of that year. In August, Trankiem wrote a memorandum to file concerning Galvao which stated "I have to face his inconsistent, abusive, argumentative and humiliating behavior, with a consequent reduction in my own productivity level." (*Id.* at § 21.) Shortly thereafter, however, Trankiem extended the warning period another sixty days and on September 1, 1993 reclassified Galvao as a Grade 8, in order to avoid further controversy on the reclassification issue. On November 8, 1993, however, Trankiem terminated Galvao's employment.

Galvao subsequently filed this action in Norfolk Superior Court on April 6, 1995. On April 24, 1995, Gillette filed notice of removal to this court.

Galvao specifically alleges that Gillette discriminated against him on account of his race and national origin by failing to reclassify his job to a grade 8. He further alleges that Gillette engaged in a program of retaliation following his initial complaint to MCAD culminating in the termination of his employment.

II.

Summary judgment will be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Mesnick v. General Elec. Co.*, 950 F.2d 816, 822 (1st Cir. 1991), *cert. denied*, 504 U.S. 985 (1992). The non-moving party "may not rest upon the mere allegation or denials of the . . . pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The evidence put forth "cannot be conjectural or problematic; it must have substance in the sense that it limns differing versions of the truth which a factfinder must resolve at an ensuing trial." *Mesnick*, 950 F.2d at 822 (quoting *Mack v. Great Atl. & Pac. Tea Co.*, 871 F.2d 179, 181 (1st Cir. 1989)).

Summary judgment may be appropriate even in an employment discrimination case " 'where elusive concepts such as motive or intent are at issue . . . if the nonmoving party rests upon conclusory allegations, improbable inferences, and unsupported speculation.' " *Smith v. Stratus Computer Inc.*, 40 F.3d 11, 13 (1st Cir. 1994), *cert. denied*, 115 S. Ct. 1958 (1995) (quoting *Goldman v. First Nat'l Bank of Boston*, 985 F.2d 1113, 1116 (1st Cir. 1993) (citations omitted)). When deciding a motion for summary judgment, a court must " 'view the entire record in the light most hospitable to the party opposing summary judgment, indulging all reasonable inferences in that party's favor.' " *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (quoting *Griggs-Ryan v. Smith*, 904 F.2d 112, 115 (1st Cir. 1990)).

III. Title VII Violations

Where there is no "smoking gun" evidence of discrimination, as is the case here, claims of disparate treatment pursuant to Title VII require analysis under the burden-shifting paradigm of *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254-56 (1981). Under *McDonnell-Douglas*, a plaintiff must first establish a prima facie case of discrimination. Once he has done so, the burden shifts to the defendant to articulate a legitimate, non-discriminatory reason for its actions. At that point, the presumption of illegal discrimination vanishes, *Mesnick*, 950 F.2d at 825 (citing *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 9 (1st Cir. 1990)), and the plaintiff is required to prove by a preponderance of the evidence that "the asserted reason is a mere pretext for unlawful discrimination." *Dance v. Ripley*, 776 F.2d 370, 372 (1st Cir. 1985). The burden that shifts between the parties is the burden of production; the burden of persuasion remains at all times with the plaintiff. *Saint Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993); *Burdine*, 450 U.S. at 253; *Woods v. Friction Materials, Inc.*, 30 F.3d 255, 260 (1st Cir. 1994).

I will review Galvao's claims within the *McDonnell-Douglas* framework, separating for more logical analysis the alleged failure to promote and the retaliation claims.

A. Failure to Upgrade

1. *The Prima Facie Case* – Gillette has not argued that Galvao has failed to establish a prima facie case. Upon review of the record, I find both parties have dismissed

this requirement too easily. In an ordinary failure to promote case, the plaintiff is required to show that 1) he is a member of a protected group; 2) he was qualified for promotion; 3) he applied for and was denied the promotion; and 4) the person actually promoted was not a member of the protected group. *Bundy v. Jackson*, 641 F.2d 945, 951 (D.C. Cir. 1981). The instant action, however, does not fit the mold of a garden-variety failure to promote claim because here, unlike in other failure to promote situations, there was no open position for which Galvao applied, and consequently there were no non-protected persons promoted in his stead.

In the sole similar reported case I have been able to find, the court noted that a different test was required in the case of a non-competitive promotion. *See Young v. State Farm Mut. Auto. Ins. Co.*, 868 F. Supp. 937, 944-45 (W.D. Tenn. 1994). The court in *Young* modified the failure to promote test in order to allow the plaintiff to show that "1) she was a member of a protected class and 2) that for the same or similar conduct she was treated differently than similarly-situated non-protected persons." *Id.* at 945 (citing *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582-83 (6th Cir. 1992)). Although *Young* involved a claim under the Age Discrimination in Employment Act of 1967 ("ADEA"), the First Circuit, like the Sixth Circuit, has directed that ADEA claims be analyzed under the *McDonnell-Douglas* framework utilized in Title VII discrimination cases. *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1014-19 (1st Cir. 1979). Accordingly, I adopt the non-competitive failure to promote test and proceed to apply it to the instant case.

Galvao has met the first requirement by showing that he is both black and of Cape Verdean national origin. The second requirement is, however, problematic in that because Galvao was the sole Grade 7 technician in his division, there are no similarly situated non-protected persons to whom he can compare himself. *See Young*, 868 F. Supp. at 945 (observing that "similarly-situated" analysis compared plaintiff to the non-protected members of her grade and job who were non-competitively promoted in less time than she).

Galvao's version of the similarly-situated analysis is to compare himself to Caucasian-American Grade 8 and 9 Senior Technicians and a Grade 10 Engineer, arguing that he was as-well or better qualified for their grade destination. The task of the prima facie case, however, is to establish a presumption of illegal discrimination on the part of the defendant. *Burdine*, 450 U.S. at 253-54. Although the application of the *McDonnell-Douglas* framework should not be "rigid, mechanized or ritualistic," *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978), if Galvao cannot adduce sufficient evidence to allow a factfinder to infer that he was denied a promotion while others in a non-protected group were more or less contemporaneously moved up the ladder, there can be no successful claim of discrimination. *See Oliver v. Digital Equip. Corp.*, 846 F.2d 103, 108 (1st Cir. 1988) (noting that in order to establish a prima facie case the plaintiff must demonstrate " 'at least that his rejection did not result from . . . the absence of a vacancy in the job sought.' ") (quoting *Teamsters v. United States*, 431 U.S. 324, 358 n.44 (1977)); *Loeb*, 600 F.2d at 1014. There is no such evidence to be found in the record here. Consequently, I conclude

that Galvao has failed to establish a prima facie case of race and national origin discrimination.

Because Gillette, *arguendo* assumed that the prima facie case was met, I will continue my evaluation of defendant's motion to include those grounds on which the defendant does expressly rely.

2. *Legitimate, Non-Discriminatory Explanation* – Gillette contends that Galvao was not upgraded to a Grade 8 Senior Technician because he did not possess the qualifications required for that job. Lack of qualifications is a legitimate, nondiscriminatory reason for an adverse employment action. *See Woods*, 30 F.3d at 261-62. Gillette has thereby rebutted the discriminatory inference that would have resulted had Galvao established his prima facie case. Under the *McDonnell-Douglas* framework, Galvao would now have the burden of adducing evidence that Gillette's non-discriminatory explanation is a pretext.

3. *Pretext* – Galvao first points to the Career Development Plan given him by Gillette after he had been refused an upgrade but prior to Foley's second audit. According to Galvao, this plan is evidence of pretext because the requirements for promotion laid out in the plan were apparently not imposed on Caucasian-Americans at the time they were promoted to Grade 8. In support of this contention, he selects three Grade 8 Senior Technicians, a Grade 9 Technical Associate and a Grade 10 Engineer and enumerates skills listed on his Career Development Plan that these five Caucasian-American employees do not have. He does not, however, pause to examine what skills these employees do have that he does not. Galvao's attempt to compare himself with these

five employees is unpersuasive. A brief comparative review will illustrate why.

I begin with Brendan McFadden and Richard Fewer who are Grade 9 and 10 respectively. A comparison of Galvao to these two employees is inapposite. It is barely relevant which pieces of equipment and software either of these two employees are familiar with. It may be anticipated that employees classified as Grade 9 Technical Associates and Grade 10 Engineers would be familiar with and proficient on different equipment and computer programs, especially when neither of these two positions are in the chemicals area in which Galvao worked. There is no basis to presume that because they hold a hi#her grade that they are automatically required to have a lower grade's skills as a prerequisite. Galvao is not complaining of a failure to obtain a Grade 9 or 10.position. Indeed, he has not presented me with any description of these grade jobs, therefore the qualifications of these employees have no particular bearing on this action.

Similarly, a comparison to Scott Batson does not help Galvao. At the time of his deposition, Batson had been a Grade 8 Senior Technician for twenty years. While he is not proficient on all machines listed in Galvao's Career Development Plan, he noted in his testimony that at the time of his promotion, certain of these machines were not owned by Gillette. (Batson Dep. at 13.) Moreover, Batson's area in BRAD appears to be plastics while Galvao's area was chemicals. *See* Galvao Dep., Exh. § 2. Batson's own promotion twenty years ago is simply too attenuated to have any relevance to qualifications now required for Galvao's advancement.

Steve McDonough, another Grade 8, was employed in the materials research area and has never been employed in the chemicals area. It is not especially relevant that he is not familiar with many of the machines listed in Galvao's Plan. He too is not similarly situated to Galvao.

Gerald O'Reilly, the final Grade 8 designated by Galvao, does not appear on the BRAD organization chart, however Gillette acknowledges that he works in Galvao's area. (Defendant's Memorandum in Support of Summary Judgment ("Def. Mem. Supp.") at 10.) He cannot operate two of the eleven machines listed in the Galvao Plan, is unfamiliar with chemical principles and does not use the software the Plan suggested Galvao learn. O'Reilly, however, testified he was proficient on the nine other machines listed on the Plan. (O'Reilly Dep. at 7-13.) He further testified that he was proficient on these nine machines prior to his promotion to Grade 8. (*Id.*) Galvao also alleges that O'Reilly does not fulfill the computer requirements suggested in the Plan. O'Reilly, however, testified that he is proficient on personal computers and while he doesn't use Lotus 1-2-3, he does use other spreadsheet software. In short, he has most of the qualifications listed in the Plan.[2]

The gravamen of Galvao's complaint is that the plan given him by Gillette apprising him of skills he needed to acquire in order to prepare for a reclassification to Grade

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[2] Since Galvao has not attempted to enumerate the skills listed on the Plan that he himself possesses, an accurate comparison between him and O'Reilly is not possible.

8 is too demanding when compared to the skills possessed by others currently holding that position. His argument misses the point. First, Galvao's Plan states that its function was to assist in "establish[ing] the basic competencies necessary for consideration for *promotion* to Grade 8, Senior Technician." (Pl. Mem. Opp., Exh. 1 at 1) (emphasis supplied.) This is clearly different from providing requirements for an automatic reclassification. Second, to show that others who are similarly situated – accepting for the purposes of argument that employees in a different grade than Galvao are a valid comparison – were given opportunities he was denied because of discrimination, he must at least point to others who had only his level of skills or less when promoted to the job described in the Plan.

The Plan was specifically developed for Galvao and by strongly urging him to take a basic chemistry course, it is clear that the promotion it addresses is principally in the chemicals area. Efforts to measure Galvao against Senior Technicians in other areas who apparently were promoted at different times is not valid in the absence of a demonstration not attempted here – that those in other areas required substantially the same skills for the same job and grade as are now required.[3]

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[3] I note that in his July 1990 to June 1991 Performance Planning and Review Form (covering the time period when Galvao was given the Plan), Section III, labeled "Prior Period Objectives," states that Galvao had met his prior period objectives which included developing proficiency on the use of the shaving friction tester with special protocols. "New Objectives" included the completion of an internally offered video cassette course on chemical skills. The comments attached

Galvao's second piece of evidence is the memorandum he received from the Open Door Committee justifying the refusal to reclassify him and stating that Grade 8 Senior Technicians are able to write simple computer programs, have completed or are in the process of working toward an associate's degree or equivalent certification, and supervise lower level employees. Galvao alleges that none of the five Caucasian-American employees he deposed had *all* of these qualifications or proficiencies. The memorandum is of no assistance to Galvao, however, because it also makes clear that he lacked the ability to work independently and to "take on new tasks and responsibilities or work with new equipment," and was reluctant to work with chemicals. (Pl. Mem. Opp., Exh. 2 at 2.) This is in strong contrast to O'Reilly, the single Grade 8 who could conceivably be compared with Galvao. O'Reilly does not write computer programs, and does not have nor was he working toward an associate's degree. He testified, however, that prior to his promotion to a Grade 8 he possessed all of the attitudinal characteristics the Open Door Committee found lacking in Galvao. O'Reilly's lack of education and programming ability, while possessing all the other characteristics listed

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to the overall rating state that "[Galvao] will be considered for advancement to the next grade level on completion of a course in chemical laboratory skills." (Pl. Mem. Opp., Exh. 3.)

Even if I were to hold that this commentary supplanted the Plan's requirements it would be of no avail as Galvao took no steps to complete this course. On the next evaluation, the comments pointed out that one year later, Galvao had failed to complete the video cassette course. (*Id.*)

in the Memorandum, will not support an inference of discrimination against Galvao.

Galvao also contends that the second audit Foley conducted was discriminatory in that she compared him to a hypothetical Grade 8 Technician instead of to the actual Grade 8's. in the BRAD division. Gillette counters that because Foley's mission was to evaluate the level of work Galvao was capable of, and not the actual job performance of currently employed Grade 8 Senior Technicians, any other method of evaluation would have been outside her jurisdiction. Galvao has failed to explain how this procedure discriminated against him. He has adduced no evidence that Foley's auditing procedure was different in any way than any other audit she conducted. While Galvao may have preferred the audit to measure his skills against named Senior Technicians, this is not what Foley was directed to do.

Galvao next argues that Gillette has a history of fostering a workplace environment that excludes minorities. In support of this argument, he offers the testimony of Mark Meadows, a black, Grade 12 Engineer. This testimony, however, falls far short of supporting Galvao's thesis. While Meadows testified that he believes he experienced a delay in promotion because of his race in 1979, he also testified that he received two further promotions without any delay, the last occurring in the mid to late 1980's. (Meadows Dep. at 6-7, 42-44.) Although he testified that in the 1970's when minorities were scarce at Gillette, a minority applicant would receive a higher level of scrutiny than a white applicant, (*Id.* at 51-52), he went on to state that after that particular time period, this was no longer true. (*Id.*) Indeed, Meadows makes it clear that

he believes that after the early 1980's the atmosphere at Gillette became more welcoming to minorities, most of whom were hired in the 1980's. He goes on to acknowledge that he did not personally experience, nor does he know of any incidents of discrimination or bias against minorities at Gillette after the 1980's. (*Id.* at 51-57.)

Even assuming such anecdotal and lay opinion evidence were admissible – an assumption I do not make – Meadow's testimony is not supportive of Galvao's efforts to show pretext on the part of Gillette as to him. No inference of discrimination can be drawn from Meadow's belief that his promotion was delayed based on his race in 1979 and his testimony makes it clear that whatever possibly discriminatory atmosphere existed at Gillette in the 1970's was gone by the time Galvao began to experience his problems in the late 1980's.

Gillette's stated reason for not upgrading Galvao was that he was not qualified for the job. Instead of attacking the qualifications of others who were not similarly situated, it would have been more appropriate for Galvao to have presented evidence of his own qualifications. He has failed to show that he possesses the qualifications required for the upgrade, including significantly, the ability to work without supervision, which every Grade 8 interviewed, possessed. I therefore find that Galvao has failed to show that Gillette's legitimate, nondiscriminatory reason for its failure to promote him is a pretext for illegal discrimination.

B. Retaliation

Section 2000e-3(a) of Title VII provides in relevant part:

> (a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a) (1994). Galvao alleges that after he filed his initial discrimination claim with the MCAD, he was subjected to retaliatory behavior and ultimately discharged in violation of § 2000e-3(a).

1. *The Prima Facie Case* – Claims of retaliation under title VII are subjected to the same *McDonnell-Douglas* analysis as claims of discrimination. To establish his prima facie case, a plaintiff must show:

> (1) that he engaged in protected activity, . . . (2) that his employer was aware of the protected activity, (3) that he subsequently suffered an adverse employment action and absent other evidence tending to establish a retaliatory motivation, (4) that the adverse employment action followed his protected activities within such a period of time that the court can infer retaliatory motivation.

Saad v. Stanley Street Treatment and Resources, Inc., 1994 WL 846911, *11 (D. Mass. 1994) (citing *Lewis v. Gillette Co.*, 1993 WL 291771, *3 (D. Mass. 1993), *aff'd*, 22 F.3d 22

(1994); *Hazel v. U.S. Postmaster General*, 7 F.3d 1, 3 (1st Cir. 1993); *Petitti v. New England Tel. & Tel. Co.*, 909 F.2d 28, 33 (1st Cir. 1990).

Galvao's filing of his MCAD complaint on July 16, 1992 meets the criteria of the first element of the prima facie test and his termination by Gillette in November of 1993 is clearly an adverse employment action that satisfies the third element. Evidence on the second prong of the test, however, is thin at best. In the Complaint, Galvao alleges that "[o]n at least one occasion, [his] manager told him that his supervisors did not want to talk to [him] because he had 'a legal case going on.' " (Complaint ¶ 24.) He does not, however, provide any specifics as to who actually made this remark. In his deposition, Galvao testified that Trankiem knew of his concern with Gillette's refusal to reclassify him and supported him in his quest. (Galvao Dep. Vol. I, at 124.) Trankiem testified that she first learned of the MCAD complaint through Gillette's counsel sometime during the period she supervised Galvao.[4] (Trankiem Dep. at 90.) Because Galvao's problems with Trankiem appear to have started immediately after his transfer to her supervision and he has not presented evidence that Trankiem knew of his complaint at that time, it is not clear that Galvao has fulfilled this requirement for establishing a prima facie case.

While Galvao's termination is certainly the requisite adverse employment action satisfying the third element,

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[4] Mark Meadows did testify that "[e]veryone was aware," that Galvao had taken legal action, adding that he heard about it by "hearing people talk, casually just walking through a laboratory." (Meadows Dep. at 34.)

his inability to adduce evidence establishing when his direct supervisor found out about his MCAD complaint vitiates his showing on the fourth prong of the test requiring some evidence that would allow me to infer a causal connection between the filing of the complaint and the subsequent complained of behavior and termination. This causal connection can, in the absence of other evidence, perhaps be demonstrated circumstantially by a short period of time between the protected action and the subsequent retaliatory activities. In the instant case, Galvao began working for Trankiem in February of 1993, seven months after he filed the MCAD complaint, and he alleges that her harassment of him began sometime soon after. The relevant time period, however, is still the seven month gap between the complaint and the complained of action. This span of time is too long for a factfinder to be able reasonably to draw the required inference here.

Even assuming that Trankiem knew of the complaint when the complained of behavior began and that the seven month gap does not matter because the alleged retaliatory behavior began soon enough after Trankiem entered the picture, Galvao's attempts to evade summary judgment still must fail because Gillette has articulated a legitimate, non-discriminatory reason for Galvao's termination and Galvao has not produced any evidence that this reason is pretextual.

2. *Legitimate, Non-Discriminatory Reason for Termination* – In response to the allegations of retaliation, Gillette has produced well-documented evidence of Galvao's failure to perform his work up to his employer's specifications and that his attitude toward his supervisor and other Gillette management was rude and insubordinate.

Evidence of the failure to perform is contained in Galvao's July 1992-August 1993 Performance and Planning Review Form terming his overall performance "Unacceptable," and in testimony by Trankiem accompanied by copies of memoranda she wrote both to Galvao and to file. Evidence of Galvao's insubordinate attitude is also contained in Trankiem's deposition testimony and memoranda, and in testimony by Dr. Stan Wreford, Director of the BRAD division. I find that Gillette has produced a non-discriminatory, legitimate reason for Galvao's dismissal.

3. *Evidence of Pretext* – Galvao argues that the very fact that his first evaluation after filing the MCAD complaint declined is proof of pretext. Galvao was supervised by Mike Kwiecien for a portion of the evaluation period – from September of 1992 until February of 1993 – after which time his supervision was taken over by Trankiem. The July 1992-June 1993 report, completed by Trankiem and reflecting the year following the complaint, is to be sure abysmal. On this report, Galvao received 6 "Unacceptable" ratings and 2 "Adequate" ratings. (Pl. Mem. Opp., Exh. 3.) The applicable scale is "Exceptional," "Highly Effective," "Effective," "Adequate," and "Unacceptable." "Adequate" is the term used for expected performance for newly assigned employees. (*Id.*) This evaluation, however, is not particularly without comparison to prior ratings. Review of Galvao's last four previous evaluations will assist in placing his final rating in context.

July 1989-June 1990

Job Knowledge	Highly Effective
Productivity	Effective
Quality of Work	Exceptional
Establishing Needs and Meeting Priorities	Highly Effective
Problem Solving	Effective
Communication and Interpersonal Skills	Highly Effective
Adaptability	Effective
Attendance and Punctuality	Effective
Overall Rating	Highly Effective

July 1990-June 1991

Job Knowledge	Highly Effective
Productivity	Effective
Quality of Work	Highly Effective
Establishing Needs and Meeting Priorities	Highly Effective
Problem Solving	Effective
Communication and Interpersonal Skills	Highly Effective
Adaptability	Effective
Attendance and Punctuality	Effective
Overall Rating	Highly Effective

July 1991-June 1992

Job Knowledge	Highly Effective
Productivity	Effective
Quality of Work	Highly Effective
Establishing Needs and Meeting Priorities	Effective
Problem Solving	Effective
Communication and Interpersonal Skills	Effective
Adaptability	Effective

Attendance and Punctuality	Effective
Overall Rating	Effective

July 1992-June 1993

Job Knowledge	Unacceptable
Productivity	Unacceptable
Quality of Work	Adequate
Establishing Needs and Meeting Priorities	Unacceptable
Problem Solving	Unacceptable
Communication and Interpersonal Skills	Unacceptable
Adaptability	Adequate
Attendance and Punctuality	Unacceptable
Overall Rating	Unacceptable

Galvao began lobbying for his promotion in 1989. In 1989 and 1990, his rating was still "Highly Effective." His 1991 rating then fell to "Effective" with individual scores of 6 "Effectives and 2 "Highly Effectives" versus 4 scores of each rating the prior year. It was at this point that Galvao filed his complaint with the MCAD. In relative terms, the post-complaint evaluation dropped twice as much as the prior one had, when viewed in comparison to two years before.

This drop in ratings while marked, however, does not provide sufficient evidence of pretext. First, Galvao's evaluations significantly deteriorated prior to filing his complaint. In fact, one of his stated reasons for filing his complaint with MCAD was this decline in his evaluations. (Def. Reply Mem., Exh. A ¶¶ 11-12.) Second, he has

adduced no evidence to tie the final freefall to anything but the change in supervisor and his own attitudinal problems. For this to be relevant, Galvao must show that his treatment by Trankiem was motivated by his filing the complaint. The evidence shows otherwise.

Galvao argues in general that first Kwiecien and then Trankiem subjected him to retaliatory harassment after he filed the complaint. Evidence pertaining to Kwiecien is almost completely lacking. Galvao's only specific complaints about him are a "lack of support," (Galvao Dep. Vol. I at 30) and that Kwiecien ordered Galvao to call him when he got in each morning. (*Id.* at 34.) The evidence cannot lead to a finding of pretext as to Kwiecien.

Galvao also complains that Fred Thomkins, his manager at that time, assigned him to inventory chemicals, something that Galvao admittedly was not happy about doing. (*Id.* at 37.) In his deposition, however, Galvao acknowledged that it was not only his lack of chemical knowledge that made him uncomfortable; he also admitted that he didn't like being exposed to chemicals at all. (*Id.* at 37-41.) His allegation that Gillette failed to train him to do this job, however, is undercut by his admission that when he could not identify a chemical, he could ask a supervisor or manager for assistance. (*Id.* at 99.) Further, instead of doing so, by his own admission, he would "just put some name, any name," on the container (*Id.* at 102), despite the fact that he was aware that mislabeling could endanger others. (*Id.*)[5]

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[5] Meadows testified that he believed that Galvao had the qualifications to do the chemical inventory because of his

Giving Galvao an assignment that he disliked is not evidence of pretext. This is especially so when Galvao's career plan was designed to increase his knowledge of chemistry. Galvao's resistance to taking advantage of enhancing his chemistry knowledge is further evidenced by his failure to follow through on the video cassette chemistry course consistently recommended in his evaluation commentary.

Once Galvao was transferred to Trankiem's supervision, he was clearly under intensive supervision. According to Galvao, in addition to the poor evaluation, Trankiem subjected him to:

> [N]eedless and intrusive monitoring of work, unjustifiable criticism of work, unwarranted personal criticisms, excessive assignments, diminished scores on performance evaluations, denial of overtime pay, insufficient training, poor communication about workrelated issues and indifference to his attempts to rectify the deterioration of his employment relationship with Gillette.

(Complaint ¶ 22.) It is apparent from the evidence that this working relationship was tempestuous and often unpleasant. However, there is no support for the proposition that it was the result of a retaliatory motive.[6] Galvao

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"ability to summarize the data." (Meadows Dep. at 31.) Although Meadows didn't think Galvao had the chemical background necessary to do the job, he concurred in giving Galvao the assignment. (*Id.* at 32.)

[6] I note that in his deposition Galvao stated that he did not believe that Trankiem was personally motivated to retaliate against him for filing the MCAD Complaint. (Galvao Dep. Vol.

admits that there were "inaccuracies in his work," (Pl. Mem. Opp. at 12) while supervised by Trankiem but offers the numerous explanations, urging that each is proof of pretext. I will briefly review each category of explanation.

a. *Insufficient Training* – While working under Trankiem, Galvao was required to use a differential scanning calorimeter ("DSC") and a thermographometric analyzer ("TGA"). He contends that he lacked the proper training to use these instruments and that a Grade 8 Caucasian-American technician, Gerald O'Reilly, attended a two week training course for these machines. O'Reilly, however, simply testified that he took a special equipment course in North Carolina sponsored by Gillette. (O'Reilly Dep. at 5.) There was no testimony that the special equipment included these two machines.

Galvao also alleges that Trankiem refused to personally provide him with adequate training. He admits that Trankiem gave him training at the beginning of his stint with her, (Galvao Dep. Vol. I at 60-64) but thereafter urged him to ask other technicians for help. Galvao's response was to demand that Trankiem conduct his training personally. In a memorandum dated April 22, 1993, Galvao complained to Trankiem about "basic training problems" and concluded:

III at 63-64.) He does, however, allege that Trankiem was the tool by which Wreford and Dr. Bush, Wreford's superior, retaliated against him for filing the complaint. (*Id.* at 143.) There is no evidence, however, that Wreford or Bush overcame what Galvao admits was Trankiem's natural non.discriminatory motivation.

> With regard to 'consulting other technicians first,' I believe that other technicians have their own responsibility and I respect their own time. I expect you to train me.

(*Id.* at Exh. 17.) Training, apparently, was not unavailable as Galvao asserts. That Trankiem didn't administer it personally is hardly the point. Indeed these complaints serve to underscore the proposition that Galvao refused either to work effectively with others or show individual initiative.[7]

b. *Malfunctioning Equipment* – Galvao contends that another reason his work was inaccurate was that the machines he was assigned to work on were poorly maintained and constantly malfunctioned. Specifically he complains about the felt-cutter, the fiber-cutter, the sprayer, the TGA, the occiliscopes and the computers. According to Galvao, when he would call these deficiencies to Trankiem's attention, she would insist that he stop talking and walk away.

When O'Reilly, who operated the felt-cutter prior to Galvao and trained him on its use, was asked if there was ever a problem with the equipment, he said he had occasional problems with it. (O'Reilly Dep. at 19.) Francis Smith, another Grade 8 Senior Technician testified that although the felt-cutter broke down on occasion, he felt it was a "pretty reliable instrument." (Smith Dep. at 35-36.)

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[7] In a similar vein, Galvao argues that when machinery was not working properly, it was Trankiem's job to deal with it even though he had been told to take the initiative and either repair the instrument or arrange for someone else to repair it. (Galvao Dep., Exh. 9.)

McFadden once repaired a fiber-cutter (McFadden Dep. at 37), however this is apparently a different machine from the felt-cutter (O'Reilly Dep. at 19.)

Similarly, the other technicians Galvao deposed testified that they repaired the sprayer. Smith, however, called the sprayer "very reliable," (Smith Dep. at 36), and McFadden could recall only two occasions when it was necessary to repair the machine and testified that he never heard any Gillette employee complain about it. (McFadden Dep. at 35-36.) McDonough found the sprayer "inconsistent" but would not call it defective, merely "old." (McDonough Dep. at 26.) In regard to the TGA, Smith testified that he was once required to repair the TGA, however after diagnosing it as "no good," he recommended that the company "get rid of it," which it did. (Smith Dep. at 38-39.) It seems clear from the testimony proffered by Galvao and the others, that the equipment he used was not perfect; however, no one else found it to be perpetually malfunctioning or a hinderance to performance. In any event, there is no basis for a finding of retaliation on this point.

c. *Trankiem's Scrutiny of Galvao's Productivity* – It is undisputed that while Trankiem supervised Galvao she developed and kept assorted productivity charts on his work. Trankiem testified that the productivity standards she expected from Galvao were based on how long it would have taken her or Gerry O'Reilly, a technician she previously supervised, to complete an assignment. (Trankiem Dep. at 27.) In Trankiem's opinion, the time estimates allowed a "comfortable time to finish." (*Id.*) Trankiem also testified that while she kept extensive notes on Galvao's performance, she also kept notes on

two other employees when their productivity levels were unacceptable. (*Id.* at 62-63.) Galvao was the only employee, however, who in her opinion had a "severe problem." (*Id.*)

Trankiem may have been demanding and exhaustive in her supervision, but a showing that Galvao's lack of production and poor quality of work was not the motivating factor for termination cannot be mounted on that basis. A review of Trankiem's daily memoranda to Galvao and her daily recording of his accomplishments – or lack thereof – reveal that Galvao was not producing. *See* Trankiem Dep. Exhibits. Two other employees Trankiem supervised apparently were able to meet her demanding standards. O'Reilly found her to be a "good supervisor" although one who "expects an awful lot out of you. . . ."[8] (O'Reilly Dep. at 21.) Significantly, another Cape Verdean, Kathy Mederia, a student who worked with Trankiem at the same time as Galvao, apparently was able to meet Trankiem's standards and occasionally redid Galvao's work. (Trankiem Dep. at 49-50.) Galvao asserts that many of the comments Trankiem made in her daily reviews of his work were "gratuitous, personal and disparaging," and occasionally punctuated with an exclamation point, thereby elucidating her prejudicial state of mind. (Pl. Mem. Opp. at 14.) What is clear from a review of these documents is that Trankiem's state of mind was one of

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[8] Galvao was adamant about not having his production compared to other technicians like O'Reilly (Trankiem Dep. at 48). This is ironic considering that O'Reilly is one of the Grade 8 Technicians Galvao wants to be compared to when it comes to skills and proficiencies. *See supra* Section III.A.3.

increasing frustration. None of these comments, however, reflect a state of mind involving an illegal motivation.

Galvao's final point is that Wreford, the Director of BRAD, instructed Trankiem to "write down everything Galvao says." (*Id.*) This, in Galvao's opinion is evidence that Gillette was attempting. to put him on an "express track to termination." When read in context, however, Wreford did not tell Trankiem to write down everything Galvao said, but to write down all comments Galvao made which Trankiem felt were harassing or related to confrontations between the two. (Trankiem Dep. at 19.)

d. *Galvao's Stress* – Galvao's reaction to Trankiem's tracking of his work was to declare that he was under stress and depressed. In a memorandum to Wreford, he claimed that he was "under lots of pressure, continuous harassment and psychological torture," and analogized himself to a slave. (Wreford Dep., Exh. 4.) Galvao blames this stress for inaccuracies in his work and alleges that Trankiem, by both putting on the pressure and then failing to alleviate his feelings, was motivated by discriminatory animus. Like his other allegations, this also is unsupported by the evidence. That Trankiem and Wreford knew that Galvao was becoming more and more upset and did little to attempt to change it may be unfortunate from a human resources perspective, but is not indicative of illegal discrimination.

e. *Failure to Follow Personnel Policies* – Galvao alleges that Gillette did not follow established personnel policies in order to address his concerns. The policy in question, however, does not appear to help Galvao's case. Gillette Company Policy E-3 puts the burden on the employee

who must present a problem first to his immediate supervisor, or in the alternative to two successive levels of management. (Wreford Dep., Exh. 7.) Galvao complied with both of these requirements by first complaining to Trankiem and then to Wreford. The policy further provides that if no satisfaction is to be had at that point, the employee can bring his problem to the Open Door Panel, something Galvao had already done with a different problem. (*Id.*) Galvao, did not, however, take that next step here. It is hard to see, therefore, how Gillette deviated from its policy. Galvao does not allege that he was prevented from going to the Open Door Panel.

f. *Probationary Period and Termination* – Galvao argues that Gillette has misrepresented his job performance but this proposition is not supported. His previous acceptable performance, commented on by Meadows (Meadows Dep. at 16), does not assure continued acceptable performance, especially in light of the change in supervisors.

His argument that if his work was so unsatisfactory, he should have been removed sooner is even less viable. After claiming that Gillette didn't follow its personnel policies, he is now complaining that they did. A probationary period prior to a final warning and dismissal is an opportunity for the poorly performing employee to turn himself around. That Galvao did not do so to Trankiem's satisfaction is not indicative of a discriminatory motive.

Further, Trankiem's belief that Galvao could do the job *prior* to taking on his supervision does not raise an issue of material fact concerning his actual performance

during her supervisory period. That performance is thoroughly documented, as are Galvao's often insubordinate refusals to do anything to help himself.[9]

g. *Insubordinate, Rude and Emotional Behavior* – Galvao vehemently denies that he was ever insubordinate[10] or uncivil to Trankiem. The evidence of record belies this supposition. Trankiem documented one occasion when she asked Galvao to leave her office and he refused, forcing her to threaten to call security and finally to leave her office to get away from him. (Galvao Dep., Exh. 7.) At other times identified above, he refused to follow a direct instruction to see other technicians for assistance. Galvao also disparaged Trankiem to others by referring to her Vietnamese national origin in the context of "torturing him." (Wreford Dep. at 36-40.) The final written warning issued to Galvao on May 5, 1993 also documents "disrespectful and rude" behavior. (Trankiem Dep., Exh. 20.) Galvao has presented no evidence that Trankiem's response to this behavior was motivated by illegal discrimination.

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[9] Galvao also argues that pretext can be discerned from Trankiem's admission that his performance improved during her supervisory period. Trankiem's testimony, however, while acknowledging that Galvao's performance did not deteriorate, and in fact improved slightly, clearly indicated that his performance was at no time, up to her standards. (Trankiem Dep. at 76-77.)

[10] Insubordination is recognized by Gillette as a form of misconduct rendering an employee ineligible for termination pay. *See* Trankiem Dep., Exh. 1.

h. *Reclassification to Grade 8* – Apparently hoping that Galvao's attitude was the result of his chronic dissatisfaction with his grade level, Trankiem reclassified him as a Grade 8 Senior Technician in September of 1993, approximately two months prior to termination. The stated reason for the reclassification was the realization that "the issue of [Galvao's] grade level may have been distracting to [him] and impacted [his] performance." (*Id.* at Exh. 21.)

The reclassification memorandum made clear, however, that Galvao's performance in no way warranted the reclassification. (*Id.*) The memorandum also enumerated performance characteristics which would have to be met by Galvao during the sixty day period subsequent to the reclassification. *Id.* These requirements included accurate and timely completion of work, maintenance of certain machines, and civil behavior toward and cooperation with Trankiem. (*Id.*)

Galvao argues that the promotion was a pretextual afterthought on the part of Gillette, devised to make it seem that his planned termination was not discriminatory. As evidence of this, Galvao points out that he had not mentioned an upgrade during the previous ten months. This is not compelling. The entire record, read together, paints a picture of a supervisor who took Galvao on because she was his friend and wanted to help, was nevertheless quite demanding, and ended up with a difficult employment situation. This picture is consistent with the probation period extensions, daily reviews, the written final warning and a last ditch effort to help Galvao, in which Trankiem finally eliminated what she

thought was a bone of contention, the reclassification to Grade 8.

Galvao's explanations of pretext reflect a working relationship that precipitously deteriorated during the course of seven months. Whether Trankiem was overly demanding or prescriptive is ultimately immaterial to my analysis. Galvao has failed to adduce sufficient evidence to satisfy a reasonable factfinder that the actions of Trankiem and Gillette were a mask for illegal discrimination; therefore he cannot forestall summary judgment.

IV. Claims under Chapter 151B, § 4

Although Massachusetts has a lower threshold for the pretext hurdle, *see Blare v. Husky Injection Molding Systems, Boston, Inc.*, 419 Mass. 437 (1995), I conclude from the foregoing analysis that Galvao has not presented "evidence that the defendant's asserted reasons were not the real reasons for the action." *Id.* at 443. I therefore hold that Galvao has failed to offer sufficient evidence from which I can infer pretext simpliciter, not to mention pretext for discrimination or retaliation.

V.

For the reasons set forth more fully above, the motion for summary judgment is GRANTED.

/s/ Douglas P. Woodlock
DOUGLAS P. WOODLOCK
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MANUAL GALVEO, Plaintiff, v. THE GILLETTE COMPANY, Defendant.	)	CIVIL ACTION NO. 95-10843-DPW

JUDGMENT

WOODLOCK, District Judge

In accordance with this Court's Memorandum and Order issued on July 30, 1996, allowing the Defendant's Motion for Summary Judgment, it is hereby ORDERED

Judgment for the defendant against the plaintiff.

BY THE COURT,

/s/ Rebecca Greenberg
Deputy Clerk

DATED: July 31, 1996

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS

MANUEL GALVAO, Plaintiff v. THE GILLETTE COMPANY, Defendant	CIVIL ACTION NO. 95-10843-DPW

MOTION TO WITHDRAW APPEARANCE

The undersigned counsel, Helene Horn Figman and Patricia L. Davidson, on behalf of Kramer & Figman, P.C., hereby request permission to withdraw as attorneys for the Plaintiff, Manuel Galvao, in the above-captioned matter.

In support of this motion, we state that communication between our office and the Plaintiff has deteriorated as a result of disagreement regarding the future course of the litigation of this matter.

On November 2, 1995, we received a letter from the Plaintiff discharging this office as his legal counsel. On November 9, 1995, the Plaintiff retrieved his entire case file from our office.

At this time, the Plaintiff has informed us that he has not retained new counsel. There are no motions presently pending in this matter and the trial has not been scheduled. Discovery is scheduled to be completed by February 15, 1996 and the final pre-trial conference is scheduled for April 11, 1995.

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS

MANUEL GALVAO, Plaintiff v. THE GILLETTE COMPANY, Defendant	CIVIL ACTION NO. 95-10843-DPW

AFFIDAVIT OF PATRICIA L. DAVIDSON
IN SUPPORT OF MOTION
TO WITHDRAW APPEARANCE

I, Patricia L. Davidson, on Oath do depose and say as follows:

1. I am an attorney licensed to practice law in Massachusetts. I am admitted to the United States District Court for the District of Massachusetts. I practice law with the firm of Kramer & Figman, P.C.

2. In February 1995, the Plaintiff, Manuel Galvao, retained our firm to represent him in a discrimination action against The Gillette Company.

3. In March, 1995 we filed a complaint on his behalf pursuant to M.G.L. c.151B and Title VII of the Civil Rights Act of 1964.

4. Since that time, communication between our office and the Plaintiff has deteriorated as a result of disagreement regarding the future course of the litigation of this matter.

5. On November 2, 1995, we received a letter from the Plaintiff discharging this office as his legal

counsel. On November 9, 1995, the Plaintiff retrieved his entire case file from our office.

6. At this time, the Plaintiff has informed us that he has not retained new counsel. I advised the Plaintiff to retained legal representation as soon as possible.

7. There are no motions presently pending in this matter and the trial has not been scheduled. Discovery is scheduled to be completed by February 15, 1996 and the final pre-trial conference is scheduled for April 11, 1995. I have advised the Plaintiff to pay close attention to the Scheduling Order in this matter.

8. The Plaintiff has been notified of the Motion to Withdraw Appearance by certified mail.

Signed under the pains and penalties of perjury this 9th day of November, 1995.

_____

Patricia L. Davidson

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

MANUEL GALVAO, Plaintiff v. THE GILLETTE COMPANY, Defendant	CIVIL ACTION NO. 95-10843-DPW (Filed Nov. 13, 1995)

MOTION TO WITHDRAW APPEARANCE

The undersigned counsel, Helene Horn Figman and Patricia L. Davidson, on behalf of Kramer & Figman, P.C., hereby request permission to withdraw as attorneys for the Plaintiff, Manuel Galvao, in the above-captioned matter.

In support of this motion, we state that communication between our office and the Plaintiff has deteriorated as a result of disagreement regarding the future course of the litigation of this matter.

On November 2, 1995, we received a letter from the Plaintiff discharging this office as his legal counsel. On November 9, 1995, the Plaintiff retrieved his entire case file from our office.

At this time, the Plaintiff has informed us that he has not retained new counsel. There are no motions presently pending in this matter and the trial has not been scheduled. Discovery is scheduled to be completed by February 15, 1996 and the final pre-trial conference is scheduled for April 11, 1995.

Douglas P. Woodlock, U.S.D.J.

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS

MANUEL GALVAO, Plaintiff v. THE GILLETTE COMPANY, Defendant	CIVIL ACTION NO. 95-10843-DPW

MOTION TO RECONSIDER MOTION TO WITHDRAW APPEARANCE AND REQUEST FOR A HEARING

The undersigned counsel, Helene Horn Figman and Patricia L. Davidson, on behalf of Kramer & Figman, P.C., hereby request that this Court reconsider its decision of December 6, 1995 denying counsel's Motion to Withdraw, attached hereto as Exhibit A.

In support of this Motion and in addition to reasons outlined in the Motion to Withdraw and accompanying Affidavit, we state the following:

1. Since the Plaintiff's discharge of this office by letter dated October 30, 1995, the Plaintiff has made repeated representations and assurances that he was about to retain new counsel.

2. However, the Plaintiff currently informs us that he has not obtained successor counsel and that he will need ten (10) or twelve (12) months to obtain a new attorney.

3. The Defendant noticed the Plaintiff's deposition for December 12, 1995 and agreed to continue the

deposition until January 15, 1995 upon the Plaintiff's representation that he was in the process of retaining new counsel.

4. The Plaintiff has strongly indicated that he will not appear at the deposition and will not participate in a meeting to prepare him for the deposition.

5. The Plaintiff refuses to cooperate in Answering the Defendant's Interrogatories or Responding to the Plaintiff's Request for Production of Documents.

6. On at least one occasion, the Plaintiff has instructed us not to have contact with the Defendant's attorneys.

7. The Plaintiff refuses to accept our recommendations regarding his obligations pursuant to the Federal Rules of Civil Procedure.

8. The Plaintiff has insisted that we take action on his behalf beyond the parameters of the Federal Rules of Civil Procedure, including insisting that we continue all events scheduled in this matter for ten (10) or twelve (12) months.

9. The Plaintiff wishes to address the Court directly on his perceived need for said continuance.

In conclusion, the deterioration of the communication between the Plaintiff and our office and the Plaintiff's articulated lack of respect for both the Federal Rules of Procedure and our professional opinion have made it impossible for us to fulfill our obligations to him, this Honorable Court and the opposing party.

WHEREFORE, we respectfully request that this Court allow this firm to withdraw as attorneys for the Plaintiff.

We also respectfully request a hearing on this motion so that all interested parties, including the Plaintiff himself, may address issues relevant to this matter.

Respectfully submitted,
Attorneys for Plaintiff

/s/ Patricia L. Davidson
Helene Horn Figman, BBO #164860
Patricia L. Davidson, BBO #556647
KRAMER & FIGMAN, P.C.
Three Allied Drive, Suite 120
Dedham, MA 02026
(617) 329-1515

Dated: December 5, 1996

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MANUEL GALVAO Plaintiff VERSUS THE GILLETTE COMPANY Defendant	CA-95-10843-DPW

BEFORE THE HONORABLE DOUGLAS P. WOODLOCK
UNITED STATES DISTRICT COURT JUDGE
HEARING
JANUARY 12, 1996

APPEARANCES:

PATRICIA L. DAVIDSON, ESQ, Kramer & Figman, P.C., 3 Allied Drive, Dedham, Massachusetts 02026, on behalf of the Plaintiff

BONNIE B. EDWARDS, ESQ, Ropes & Gray, One International Place, Boston, Massachusetts 02110-2624, on behalf of the Defendant

Courtroom No. 8 – 2nd Floor
Post Office & Courthouse Bldg.
Boston, Massachusetts 02109
11:00 A.M. – 11:12 A.M.

Pamela R. Owens – Official Court Reporter
204 Post Office & Courthouse Building
Boston, Massachusetts 02109

Method of Reporting: Computer-Aided Transcription

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JANUARY 12, 1996

MS. DAVIDSON: Good morning, Your Honor.

THE COURT: If the parties could introduce themselves.

MS. DAVIDSON: I'm Patricia Davidson. I'm the attorney who represents the plaintiff, Manuel Galvao. I'd like to thank the Court for meeting with us this morning. This is my client, Manuel Galvao.

THE COURT: Okay.

MS. EDWARDS: I'm Bonnie Edwards and I represent the Gillette Company.

THE COURT: Well, I have received a letter from Mr. Galvao showing a copy to Ms. Davidson. It does not show a copy to opposing counsel. And I don't think it should go to opposing counsel since it is reflects communications between Mr. Galvao and his counsel over the conduct of the case. I have, in addition, this Motion to Reconsider the Motion to Withdraw Appearance and Request for a Hearing here, which I gather was served on opposing counsel as well.

The circumstances are these. I want to make this abundantly clear. Until there is compliance with our local rule regarding withdrawal – and that's Rule 83.5.2, subsection (c) which requires that any notice of [p. 3] withdrawal or effort to withdraw be preceded or accompanied by a notice of appearance of other counsel, I'm not going to permit withdrawal in this case. The relationship between counsel and client is, at least in this action, not

something that I'm going to review in the absence of compliance with the rule. The way in which we have set up the Civil Justice Reform Act proposals requires that there be a consultation between counsel and the client concerning the conduct of the case, budget involved in the case, that sort of thing, that there be a certification provided. One was provided here. And beyond that, if there are disagreements or views that certain things that should be done are not being done, for whatever reason, that's a matter between counsel and the client.

There is other dimension. If someone files a lawsuit in this jurisdiction, there is an entitlement – and it's been reinforced by the Civil Justice Reform Act – to the prompt resolution of it. And I'm not going to interfere with the schedule that I established in this case. It will be met. If there is dissatisfaction with the level of preparation, that's another matter to be taken up on another occasion, if taken up at all. But, disinclination to appear at a deposition is not something that I'm going to find acceptable. I don't find it [p. 4] acceptable. The desire to do additional things may or may not be well founded, but it is not going to be a basis for extending the time in this case. In the absence of some other counsel appearing on your behalf, your present counsel will remain in place here.

So, it really comes down to just that. There is no other choice as far as I'm concerned here. I have read through the materials. I express no view about the substance of the discussions between you and your counsel about the proper resolution of the case. That's a matter for both of you to decide. This much is clear: That the defendant has been accused of certain wrongdoing. They are entitled to a prompt disposition of those allegations.

And more than that, the public is entitled to a prompt disposition of any case that's placed in this Court.

So, I want you to understand what my position is with respect to it. I see no basis to allow the Motion to Reconsider the Motion to Withdraw under the present premises. But I'll hear you any further. Ms. Davidson, do you have anything else?

MS. DAVIDSON: Well, Your Honor, I believe you have addressed my chief concerns, that the plaintiff understands the importance of complying with the discovery rules and that discovery depositions, interrogatories, producing documents are an integral part of every case. [p. 5] And that as long as Mr. Galvao and I have this professional relationship, that we must work together to comply with the rules that the Court outlined.

THE COURT: Well, that's absolutely the case. And more than that, failure to comply with those rules can lead to various sanctions, including dismissal of the case. Failure to appear at a deposition, for example, under these circumstances would prompt me to consider very seriously whether or not I would simply dismiss the action. Failure to provide discovery of other types would also lead to such an inquiry or consideration of other lesser sanctions such as precluding evidence from being presented. But this is not an undertaking in which one of the parties does what it feels like doing. This is an undertaking in which important rules are in place. Important procedures must be followed. If they are not followed, consequences flow from that. And I emphasize again that recalcitrance is not going to be a basis for extending the time here.

Mr. Galvao, anything else?

MR. GALVAO: Well, if your order is for that, all I have to say is the relationship – the reasons why the relationship turned this way is that when we first agreed to –

THE COURT: Well, let me say, Mr. Galvao, two [p. 6] things: Number one, I think you should be very careful about making any statements in the presence of opposing counsel.

MR. GALVAO: I'm sorry.

THE COURT: Number two, I have your letter. I have reviewed it very carefully. I'm going to seal it in the records of the court because I do not believe it should be shown to the other side because it reflects discussions that you have had with your counsel about how this case should proceed and relative judgments about various aspects of the case. But I'm familiar with all that you have said here. I have to tell you that I'm not of the view that this is the occasion to evaluate the level of services of counsel or the difficult economic judgments that parties have to make when they engage in litigation.

There is no question that there is a disparity from time to time between parties. And consideration is given to that in various sorts of ways. But it's not a grounds to demand everything from counsel and, then, if counsel is unable to provide that level of service, because of limitations on the resources, to make counsel the responsible party for various kinds of very practical decisions that arise during the course of litigation. When I say – or when you say I'm firm, you're right. But [p. 7] I'm firm

because our rules are firm. Our rules have been developed in an effort to provide every litigant in this court with a speedy, inexpensive and fair determination of their case. And firm and forceful are those rules, as necessary, to provide that for everyone, both plaintiffs and defendants.

So, is there anything else beyond what you've provided in your letter?

MR. GALVAO: I accept your ruling.

THE COURT: All right. So, you'll be going forward, I gather, on the 15th with the deposition?

MR. GALVAO: Yes.

THE COURT: And you'll follow through with discovery promptly thereafter?

MS. DAVIDSON: Absolutely.

MS. EDWARDS: Your Honor, may I ask – would Your Honor enter an order that the deposition go forward?

THE COURT: Well, I'm not going to change the ordinary rulings. Mr. Galvao has heard what I've had to say. He'll make his own judgments about it. I see no reason at this point to enter a separate order here.

MS. EDWARDS: Your Honor, at this point, documents were requested that are overdue.

THE COURT: Well, the way to deal with that is to make a motion, although I strongly suggest that you try [p. 8] to work it out among yourselves before that.

I'm only going to act on what's before me. What's before me formally is a Motion to Reconsider. I'm denying the Motion to Reconsider for the reasons that I've set forth here and the parties will work toward a prompt resolution of the case.

MS. EDWARDS: Thank you.

MS. DAVIDSON: Thank you very much, Your Honor.

THE COURT: All right. Then we'll be in recess.

RECESSED AT 11:12 A.M.

CERTIFICATE

I, PAMELA R. OWENS, Official Court Reporter, U. S. District Court, do hereby certify that the foregoing is a true and correct transcription of the proceedings taken down by me in machine shorthand and transcribed by same. I certify that the transcript fees charged and the page format used by me comply with the requirement of this Court's court reporter plan and the requirements of the Judicial Conference of the United States.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

MANUEL GALVAO, **Plaintiff** **v.** **THE GILLETTE COMPANY,** **Defendant**	**CIVIL ACTION NO. 95-10843-DPW** **(Filed Jan. 15, 1996)**

MOTION TO RECONSIDER MOTION TO WITHDRAW APPEARANCE AND REQUEST FOR A HEARING

The undersigned counsel, Helene Horn Figman and Patricia L. Davidson, on behalf of Kramer & Figman, P.C., hereby request that this Court reconsider its decision of December 6, 1995 denying counsel's Motion to Withdraw, attached hereto as Exhibit A.

In support of this Motion and in addition to reasons outlined in the Motion to Withdraw and accompanying Affidavit, we state the following:

1. Since the Plaintiff's discharge of this office by letter dated October 30, 1995, the Plaintiff has made repeated representations and assurances that he was about to retain new counsel.

2. However, the Plaintiff currently informs us that he has not obtained successor counsel and that he will need ten (10) or twelve (12) months to obtain a new attorney.

1/12/96 DENIED, no successor counsel having been identified

/s/ Douglas P. Woodlock, U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MANUEL GALVAO Plaintiff VERSUS THE GILLETTE COMPANY Defendant	CA-95-10843-DPW

BEFORE THE HONORABLE DOUGLAS P. WOODLOCK
UNITED STATES DISTRICT COURT JUDGE
HEARING
APRIL 11, 1996

APPEARANCES:

PATRICIA L. DAVIDSON, ESQ. AND MICHAEL M. KRAMER, ESQ., Kramer & Figman, P.C., 3 Allied Drive, Dedham, Massachusetts 02026, on behalf of the Plaintiff

RICHARD P. WARD, ESQ, Ropes & Gray, One International Place, Boston, Massachusetts 02110-2624, on behalf of the Defendant

Courtroom No. 8 – 2nd Floor
Post Office & Courthouse Bldg.
Boston, Massachusetts 02109
2:55 P.M. – 3:15 P.M. (Chambers)
3:30 P.M. – 3:40 P.M.

Pamela R. Owens – Official Court Reporter
204 Post Office & Courthouse Building
Boston, Massachusetts 02109

Method of Reporting: Computer-Aided Transcription

[p. 2] CA-95-10843-DPW

APRIL 11, 1996

NOTE: (Ex parte conference held in chambers between the Court and counsel for plaintiff not made a part of this transcript).

THE COURT: Well, Ms. Asiaf, on my behalf, allowed the Motion for Extension of Time to File the Motion for Summary Judgment until April 27th here. Is this going to be a complete motion for summary judgment?

MR. WARD: A complete –

THE COURT: A complete motion for summary judgment, partial motion for summary judgment?

MR. WARD: No, complete. Yes.

THE COURT: Well, it seems to me not appropriate to move forward in a trial posture until I have dealt with the motion for summary judgment.

MR. WARD: I believe you're correct, Your Honor.

THE COURT: I should acknowledge – you may be seated.

MR. WARD: Thank you, Your Honor.

THE COURT: I should acknowledge that I have received correspondence from the plaintiff some time ago

and as well had a conference with counsel for the plaintiff here earlier this afternoon concerning the nature of the relationship and difficulties that have been [p. 3] created by my unwillingness to permit the withdrawal of plaintiff's counsel at various points. I have not been, I think, exposed to any discussions on the merits of the case, but simply expressions of concern, first in January by Mr. Galvao and more recently by plaintiff's counsel, concerning how best to proceed given some differences of opinion and view with respect to the case.

Plaintiff's counsel have properly sought the assistance of the Court in understanding how they should proceed in this case and were prompted to do so after seeking direction from the Massachusetts Bar Association.

I'm going to set a time for plaintiff to respond to the Motion for Summary Judgment; we'll set a date for argument on it; and I will revisit the question of withdrawal after dealing with the Motion for Summary Judgment so that I understand fully what is involved in this matter.

Ms. Davidson, how long do you need after the 27th to respond?

MS. DAVIDSON: We're cognizant that the rules provide 14 days. If the Judge would indulge us and give us 30 days, that would be greatly appreciated.

THE COURT: Yes. So that's –

MR. WARD: Your Honor, may we have – since we're scheduling it, we'd like the opportunity to file a [p. 4] reply brief in the usual time in employment cases.

THE COURT: Well, yes. I think I'll permit that. So, we'll have a response by plaintiff on May 27th and a reply brief – is that Memorial Day? Then we'll make it May 31st for plaintiff's brief, then a reply by defendant on June 14th. Mrs. Beatty, when can we set this down for?

OFF THE RECORD

THE COURT: What's the situation of counsel for either July 24th or July 31st? Are you in town? Am I trenching on somebody's vacations?

MS. DAVIDSON: That's fine with the plaintiff.

MR. WARD: That last week in July, I was hoping to be down on the Cape, Your Honor.

THE COURT: The 24th, I think, is the week before. Is that agreeable? I'd just as soon deal with it as promptly as I can.

MR. WARD: That's fine.

THE COURT: For summary judgment hearing.

MR. WARD: Oh, for summary judgment hearing?

THE COURT: Yes.

MR. WARD: Oh, that will be fine. Sure.

THE COURT: Okay. So, we'll make it July 24th for the summary judgment hearing.

Mr. Galvao, I want you to understand that the [p. 5] nature of the discussions that I have received, both from you and from counsel, are such that I think you should

understand that I anticipate that all of the positions or arguments that you wish to make will be made to me given that direction to counsel. You should also understand, however, that counsel are sophisticated in these kinds of matters, understand the nature and legal argumentation of what needs to be done. And I would urge you to consider very carefully advice that you receive from them about the way in which particular arguments may most effectively be presented to the Court. But I expect to – and I know I will – receive from your counsel the relevant arguments that you wish to make in addition to whatever arguments they also believe would be helpful to you.

I have told counsel if there is a disagreement about the presentation of certain arguments, that they are authorized by me to present the argument in a fashion that you want to have it presented, but also to have it presented alternatively in their legal judgment. I am concerned – on the basis of the communications that I have received, including your letter of January 6th – that you are insufficiently aware of the value of reliance on counsel.

And, so, to avoid any misunderstandings here, I have given directions to take the broadest possible view [p. 6] of their response in order that choices that you may believe are appropriate not foreclose your actual legal interest.

In any event, I will be reviewing this carefully for purposes of summary judgment and will then review it for purposes of trial.

I should indicate, however, that while I have taken a very hard line on withdrawal of counsel, both here and in other cases, that I am – if it continues to be pressed – likely to be more willing to permit withdrawal of counsel after the summary judgment process.

And, so, while I recognize that you have in the past indicated that you have looked for other counsel in this case, I urge you to continue to look for other counsel here so that there be only a modest interruption, either that or work more carefully and more cooperatively with your current counsel. But I will revisit the question of withdrawal after I have reviewed the Motion for Summary Judgment in this case.

Is there anything else that we need to take up?

NOTE: (No response from counsel).

THE COURT: So, I will see you on the 24th. All right?

MR. WARD: Thank you, Your Honor.

THE COURT: Thanks very much.

[p. 7] MS. DAVIDSON: Thank you very much, Your Honor.

RECESSED AT 3:40 P.M.

CERTIFICATE

I, PAMELA R. OWENS, Official Court Reporter, U. S. District Court, do hereby certify that the foregoing is a true and correct transcription of the proceedings taken down by me in machine shorthand and transcribed by

same. I certify that the transcript fees charged and the page format used by me comply with the requirement of this Court's court reporter plan and the requirements of the Judicial Conference of the United States.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 96-2062

MANUEL GALVAO,
Plaintiff, Appellant,

v.

THE GILLETTE COMPANY,
Defendant, Appellee.

ORDER OF COURT

Entered January 17, 1997

The appellant's motion for leave to file a supplemental record appendix is *denied*. The clerk is hereby instructed to return the proffered supplemental appendix to the appellant.

By the Court:

/s/ William Ng
Clerk.

[cc: Messrs. Itzkowitz, Davidson, Ward and Edwards]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 96-2062

MANUEL GALVAO,
Plaintiff, Appellant,

v.

THE GILLETTE COMPANY,
Defendant, Appellee.

ORDER OF COURT

Entered January 28, 1997

The appellee's motion to strike the appellant's brief is *granted*. The appellant shall file a new brief without reference to non-record material on or before February 7, 1997.

By the Court:

/s/ William Ng
Clerk.

[cc: Messrs. Edwards, Ward, Davidson and Itzkowitz]

Supreme Court, U.S.
FILED
DEC 29 1997
CLERK

No. 97-905

In the Supreme Court of the United States

OCTOBER TERM, 1997

MANUEL GALVAO,
PETITIONER,

v.

THE GILLETTE COMPANY,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF RESPONDENT THE GILLETTE COMPANY IN OPPOSITION

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In the
Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-905

MANUEL GALVAO,
PETITIONER,

v.

THE GILLETTE COMPANY,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF RESPONDENT THE GILLETTE COMPANY IN OPPOSITION

Respondent, The Gillette Company, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the First Circuit's opinion in this case. That opinion is unreported and is reproduced in the Appendix to the Petition (herein "App.") at 11.

STATEMENT OF THE CASE

Petitioner was discharged from his employment as a laboratory technician in the Boston Research and Development Division (BRAD) of Respondent The Gillette Company ("Gillette") for overall poor work performance and

insubordination in November 1993. Following his discharge, Petitioner, represented by counsel, Patricia L. Davidson, Esq., and the law firm of Kramer & Figman, P.C., in Dedham, Massachusetts, filed a complaint in the Superior Court for Norfolk County, Massachusetts, in March 1995. The Complaint alleged that Petitioner had been discharged because of his race and national origin, and also in retaliation for complaining about earlier alleged discriminatory acts against him, in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §2000e-1 *et seq.*, and also the Massachusetts Fair Employment Practices Act, Mass. G.L. c. 151B.

Gillette promptly caused the case to be removed to the United States District Court for the District of Massachusetts. Thereafter, the District Court entered a Scheduling Order designating February 15, 1996 as the date for completion of discovery and April 11, 1996 as the date for final pre-trial conference.

On November 13, 1995, Ms. Davidson and her colleague, Helen Horn Figman, Esq., filed a motion to withdraw their appearance as counsel for Petitioner on the ground that "communication between our office and the Plaintiff has deteriorated as a result of disagreement regarding the future course of the litigation of this matter." App. 45. Counsel did not indicate in their motion that Petitioner was seeking to proceed *pro se* and Petitioner himself did not file any separate notice of appearance *pro se* as permitted by Rule 83.5.2(b) of the District Court's Local Rules.[1] To the contrary, in an affidavit

[1] Rule 83.5.2(a) of the Local Rules of the U.S. District Court for the District of Massachusetts provides generally that "[t]he filing of the complaint shall constitute an appearance by the attorney who signs it," and that all other appearances in the case shall be made by filing a notice of appearance. Rule 83.5.2(b) then provides that:

> A party who appears *pro se* shall so state in the initial pleading or other paper filed by him or in his notice of appearance. The words "pro se" shall follow his signature on all papers subsequently filed by him in the same case.

accompanying the motion to withdraw, Ms. Davidson stated only that she had "advised the Plaintiff to retain [alternate] legal representation as soon as possible." App. 47.

On or about December 6, 1995, the District Court denied counsel's motion to withdraw. Promptly thereafter, counsel filed a motion for reconsideration and, once again, failed to include any indication that Petitioner was seeking to proceed *pro se*. Rather, counsel stated that Petitioner had repeatedly represented to them that he was in fact seeking new counsel, but that he needed more time to retain such counsel. App. 49-51. Counsel further stated that Petitioner had advised them that he would need ten to twelve months to obtain a new attorney. App. 49.

On January 12, 1996, the District Court denied the motion for reconsideration. The Court relied specifically on Rule 83.5.2(c) of the Local Rules of the District Court providing that, in the absence of a notice of appearance of other counsel, counsel of record may withdraw from a case only by leave of court.[2] App. 52-60.

The parties thereafter completed discovery and subsequently, pursuant to a schedule established by the court, Gillette presented a motion for summary judgment seeking dismissal of the Complaint. Counsel for Petitioner filed an opposition and a memorandum in support thereof. On July 30, 1996, after a hearing on the motion, the District Court entered a Memorandum and Order granting Gillette's motion for summary judgment. The Court reasoned that Gillette had articulated legitimate nondiscriminatory reasons for its

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[2] Rule 83.5.2(c) states:

> An attorney may withdraw from a case be serving notice of his withdrawal on his client and all other parties and filing the notice, provided that (1) such notice is preceded or accompanied by notice of the appearance of other counsel; (2) there are no motions pending before the court; (3) no trial date has been set; and (4) no hearings or conferences are scheduled, and no reports, oral or written, are due. Unless these conditions are met, an attorney (including one whose services have been terminated by his client) may withdraw from a case only by leave of court.

decision to discharge the Petitioner and that Petitioner had failed to produce any probative evidence that those reasons were a pretext for discrimination or retaliation against him. App. 12-43.

Petitioner, represented by new counsel, subsequently filed an appeal to the United States Court of Appeals for the First Circuit contending that he had, in fact, presented probative evidence that Gillette's articulated reasons for discharging him were a pretext for discrimination or retaliation against him and, further, that the District Court had improperly denied the motion of his prior counsel to withdraw their appearance. The First Circuit rejected both arguments on appeal. Like the District Court, the First Circuit reasoned that Gillette had articulated legitimate nondiscriminatory reasons for its discharge of Petitioner, and that Petitioner had failed to produce any probative evidence that those reasons were a pretext for discrimination or retaliation against him. App. 5-8. The First Circuit further reasoned that the District Court's refusal to permit Petitioner's prior counsel to withdraw was reviewable only for abuse of discretion and that, under the circumstances of the case, it could not say that any such abuse had occurred. The First Circuit noted particularly that, given the complexity of Title VII litigation, the District Court's conclusion that Petitioner was better off with counsel, even counsel with whom he had had a dispute over strategy, rather than being left to proceed *pro se*, was not unreasonable, especially since counsel had been bound by an ongoing ethical obligation "to prosecute [Petitioner's] case fully and effectively." App. 10. The First Circuit also observed that the District Court had advised Petitioner that, should Petitioner and counsel disagree on arguments to be presented, counsel was to present those arguments both in the form that Petitioner wished and in the form that counsel's legal judgment suggested. App. 10.

REASONS FOR DENYING THE WRIT

The writ should be denied because the decision of the First Circuit is consistent with the decisions of this Court, and of other courts of appeal, and the petition does not present any issue warranting review by this Court. More particularly, the decision of the First Circuit does not present the question asserted by Petitioner.

The District Court did not deny Petitioner the "right to represent himself" or to his "choice of counsel", as asserted in the petition, nor was the First Circuit confronted with those issues on appeal. Rather, the District Court merely refused to allow the motion of Petitioner's first counsel to withdraw until new counsel had been designated. This decision was a routine application of the court's Local Rule preventing the withdrawal of one counsel until new counsel is designated. Local Rule 85.5.2(c). The First Circuit affirmed the Court's decision on that basis.

If Petitioner had wanted to proceed *pro se*, he could have done so merely by filing his own notice of appearance *pro se* as permitted by Rule 83.5.2(b) of the Local Rules, or otherwise making a request to proceed *pro se*. There was nothing in the Local Rules or in the District Court's rulings which would have prevented Petitioner from taking such an action. Petitioner, however, did not make any request to proceed *pro se*. Rather, his counsel made a request to withdraw and asserted that Petitioner was attempting to obtain new counsel but would need ten to twelve months to do so. Petitioner in essence was seeking an extension of time to obtain new counsel. He was not seeking to proceed *pro se*.

Under the circumstances, the court was left with no choice, if it wanted to preserve the schedule it had previously established for the completion of discovery and the determination of dispositive motions, of either denying the motion of Petitioner's counsel to withdraw or compelling Petitioner to proceed *pro se* through the discovery and summary judgment proceedings despite his announced desire to obtain other

counsel. It was only in this context that the District Court denied the motion of counsel to withdraw, a ruling that was clearly reasonable under the circumstances of the case.

In light of his failure to make any request to the District Court to proceed *pro se*, or to substitute some other counsel of his choice, Petitioner's present assertions of improper denial of the right to proceed *pro se* or to obtain the counsel of his choice amount to nothing more than a type of "cat and mouse game" which numerous federal courts have repeatedly held is impermissible under the statute, 28 U.S.C. § 1654, preserving the right to proceed *pro se*. Thus, for example, in *United States* v. *Treft*, 924 F. 2d 978 (10th Cir. 1991), the United States Court of Appeals for the Tenth Circuit held that a criminal defendant had not been improperly denied the right to represent himself at trial since his request for such self-representation had been at best equivocal. In reaching this result, the Court said:

> [I]f a defendant in a criminal proceeding makes an equivocal demand on the question of self-representation, he has a potential ground for appellate reversal no matter how the district court rules. If the district court denies defendant's equivocal demand to represent himself, the defendant, on appeal, will argue that his constitutional right to self-representation has been denied. And if the district court grants defendant's demand for self-representation, the defendant, on appeal, will argue that his waiver of his right to counsel was not intelligent, knowing and unequivocal.

924 F. 2d at 979. The Court went on to conclude that, in order to avoid the possibility of any such "cat and mouse game", a defendant's election to represent himself in a criminal proceeding must be "clearly and unequivocally asserted." *See also United States* v. *Padilla*, 819 F. 2d 952, 959 (10th Cir. 1987) ("A defendant may not use the right to refuse representation by counsel to play a cat and mouse game

with the court."); *cf. Faretta* v. *California*, 422 U.S. 806, 835 (1975) (in order to represent himself accused must "knowingly and intelligently" waive his right to proceed with counsel).

In the present case, unlike the foregoing cases, Petitioner made no request at all to proceed *pro se*. Rather, as set forth above, his counsel indicated that Petitioner was searching for new counsel, but that he would need ten to twelve months to obtain such new counsel. Under the circumstances, Petitioner was not denied any right to proceed either *pro se* or with some other counsel of his choice. He was merely denied a period of ten to twelve months, or more, to make his decision. As the District Court explicitly noted, any other result would have been manifestly unfair to Gillette and inconsistent with the basic purpose of the federal rules to obtain a "just, speedy and inexpensive determination of any action." Fed. R. Civ. P.1. There is no reasonable basis for Petitioner's assertion to the contrary.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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Attorney for Respondent

Dated: December 29, 1997